SUPREME COURT, U. S.

Supreme Court, U. S.

OCT 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No. 74-475

UNIVERSAL BUILDERS, INC., ROSEWOOD CORPORATION, HAMILTON CORPORATION, LAWSON CORPORATION, INDEPENDENCE HOMES, INC., JARVIS HOMES, INC., CHATHAM TOWN HOMES, INC., and LARCHMONT HOME DEVELOPMENT CO.,

Petitioners,

vs.

SIDNEY and JULIA CLARK, REV. ROBERT ANDERSON, JR., DEE BELLANFANT, EDWARD and FREDDIE MAE BROWN, CLARANCE and MARY ANN CARR, ARTHUR and THELMA GREEN, CHARLES and CLEORIA HARDY, BESSIE HENDERSON, JOHN and WILLIE M. JACKSON, GREAD and NAOMI D. McKINNIS, JULIA W. MONTGOMERY, HARRY C. and MATTIE B. PELTON, JAMES and WILLIE PHELPS, ERNEST and SHIRLEY T. POWELL, JR., MRS. JOHNNIE RAMSEY, JOSEPH L. and BEVERLY THOMPSON, and WILLIAM and RUBY YOUNGBLOOD, on their own behalf and on behalf of all others similarly situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Universal Builders, Inc., Rosewood Corporation, Hamilton Corporation, Lawson Corporation, Independence Homes, Inc., Jarvis Homes, Inc., Chatham Town Homes, Inc., and Larchmont Home Development Co. petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit entered on July 26, 1974, and an interlocutory ruling by that Court entered on January 6, 1970.

OPINIONS BELOW.

The Seventh Circuit's decision is reported in 501 F. 2d 324 and is reprinted in full as Appendix A to this Petition. Its interlocutory ruling (on the statute of limitations question) is reported in 420 F. 2d 1191 (*cert. denied*, 400 U. S. 821), and is reprinted in full as Appendix B to this Petition.

THIS COURT'S JURISDICTION.

The judgment of the Seventh Circuit was entered on July 26, 1974, and this petition is filed within ninety days thereafter, pursuant to 28 U. S. C. § 2101. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Does 42 U. S. C. § 1982, which this Court has already held to be "plain and unambiguous" mean what it says, or notwithstanding its "plain and unambiguous" terms, does it require a seller of real property to do *other* than offer the same property at the same price and on the same terms and conditions to all who may wish to buy?
2. Does 42 U. S. C. § 1982 confer upon blacks the right, which is not enjoyed by any white, to purchase real property for a price lower than the seller is willing to accept from all who may wish to buy?

3. Is 42 U. S. C. § 1982, as construed by the Seventh Circuit, unconstitutional under the due process clause? (28 U. S. C. § 2403 may be applicable. The Seventh Circuit did not certify to the Attorney General that the constitutionality of 42 U. S. C. § 1982 was drawn in question.)
4. Does a violation of a civil rights law by a corporation automatically impose personal liability on its officers, directors and shareholders?
5. Does a cause of action for alleged discrimination in the price charged for a home sold under an installment contract accrue when the contract is signed or only when the final installment is paid, as many as thirty years later?
6. Is the Seventh Circuit's novel construction of 42 U. S. C. § 1982 so far beyond any previously imagined requirement of that section that its decision, even if correct, should not be applied retroactively to impose liability upon these petitioners based upon transactions beginning sixteen years ago?

CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED.

(a) Amendment V—Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation for Property.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

(b) Civil Rights Act of 1866, 14 Stat. 27, Section 1; 42 U. S. C. § 1982:

"All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

(c) Illinois Limitations Act, L. 1871-2, 556, Section 15, as amended; 1969 Ill. Rev. Stats., Ch. 83, Par. 16:

"Except as provided in Section 2-725 of the 'Uniform Commercial Code,' approved July 31, 1961, as amended, and Section 11-13 of 'The Illinois Public Aid Code,' approved April 11, 1967, as amended, actions on unwritten contracts, expressed or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued."

STATEMENT OF THE CASE.

Petitioners built approximately 1300 new single-family residences on the South Side of Chicago and sold most of them to blacks during a twelve-year span from 1957 through 1968. Respondents (plaintiffs below) are petitioners' customers and also represent a class of blacks who made installment purchases of said homes from petitioners. Respondents claimed that petitioners discriminated in violation of 42 U. S. C. § 1982.* The District Court's jurisdiction arose under 28 U. S. C. § 1343(4).

Respondents presented evidence for six weeks on the severed issue of liability. When they rested, the trial court found that, "Nowhere . . . is there one scintilla of evidence . . . of

* The Complaint had originally also charged petitioners with violation of securities laws, fraud, usury and unconscionability. These charges were dismissed on motion for failure to state a claim upon which relief could be granted, and the dismissal was never appealed.

discrimination," and directed a verdict. The Seventh Circuit reversed.

Respondents conceded at trial and on appeal, and the Seventh Circuit agreed that the uncontroverted evidence showed that petitioners offered to sell and sold the same house at the same price and on the same terms and conditions to all who wished to buy, regardless of their color. The Seventh Circuit held it irrelevant that petitioners had treated everyone with equality!

Respondents' evidence had disclosed, and the Seventh Circuit judicially noticed, the existence of racially segregated markets in the sale of residential housing in the Chicago area. Unnamed third persons discriminated against blacks by refusing to sell to them, thus creating two markets for new houses—one white and the other black. The Seventh Circuit found that there was greater unsatisfied demand in the black market than in the white market, and held that petitioners had *prima facie* violated 42 U. S. C. § 1982 under its "exploitation theory" by charging prices that were not "reasonable." This conclusion was arrived at on the basis of appraisers' opinions that petitioners' prices exceeded the fair market value of the homes or the prices at which other sellers sold "comparable" houses in other areas to whites.

The opinion also held that the trial court had improperly excluded certain evidence which, it further held, *prima facie* showed traditional discrimination—one treating people differently because of color. This evidence was to the effect that petitioners' *gross* profit percentage on their sales was higher than the *gross* profit percentages of two other enterprises which the Seventh Circuit considered "related" to petitioners.* One was a joint venture which built and sold an aggregate of 25 houses in 1956 and 1957 in Deerfield, Illinois, a suburb of Chicago, 30 miles north of respondents' homes, and the other was P. F. S. Development Company, which in 1969 and 1970 built and sold homes in Park Forest South, Illinois, a suburb of Chicago, at least 20 miles south of respondents' homes. Just as it was both conceded

* This "relationship" is discussed at pages 12-13.

and held irrelevant that petitioners had treated all with equality, it was undisputed but unmentioned by the Court that each of the "related" sellers had offered and sold the same home at the same price and on the same terms and conditions to all who wished to buy and that both blacks and whites did in fact buy from one of the "related" sellers. In holding that petitioners had *prima facie* violated 42 U. S. C. § 1982 by having a higher *gross* profit percentage than the *gross* profit percentage of the "related" enterprises, the Seventh Circuit did not mention that the Deerfield joint venture had a greater net profit percentage than petitioners and that P. F. S. Development Company *suffered a net loss.*

REASONS WHY THE WRIT SHOULD BE GRANTED.

I.

This Decision Conflicts with This Court's Holding in Jones v. Mayer Co., 392 U. S. 409 (1968), and Other Decisions of This Court, Raises a Serious Question of the Constitutionality of an Act of Congress, Presents a Novel Civil Rights Ruling of Substantial Public Importance and Gravity Which Has Already Received National Attention and, if Permitted to Stand, Will Revolutionize the Civil Rights Laws and the Trial of Civil Rights Cases.

The threshold questions presented by this case are whether 42 U. S. C. § 1982 means what it says and, if not, whether the statute as construed by the Seventh Circuit violates the due process clause of the Fifth Amendment. Section 1982 says:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

In *Jones* v. *Mayer Co.*, 392 U. S. 409, 420-422 (1968), this Court found these words "plain and unambiguous" and that "Congress meant exactly what it said" when it enacted them

into law. Accordingly, this Court refused to read into the statute a provision which it did not contain.* The Seventh Circuit, on the other hand, holds that the same "plain and unambiguous" statute does not mean what it says, by reading into it a provision that blacks have a right to purchase homes at "reasonable prices," or alternatively, a right to purchase homes at the same *gross* profit percentage at which a "related" company previously or subsequently sold different homes in different areas. These are rights not enjoyed by whites, and they are provisions which, like the one this Court rejected in *Jones*, the statute does not contain.

Under the Seventh Circuit's admittedly non-traditional theory of discrimination, a seller's civil rights liability is to be determined by measuring his price against some other seller's price or against an appraiser's opinion as to value. Under the Seventh Circuit's alternative theory of "so-called traditional discrimination", a seller *prima facie* violates Section 1982 if he has a higher *gross* profit percentage on homes purchased by blacks than the *gross* profit percentage which a "related" seller had in the sale of different houses of different designs and different materials in different developments and different cities, some of which were also sold to blacks. It is again now irrelevant that the seller and any "related" seller each treats everyone with equality. Under either or both of the Seventh Circuit's theories, its decision reads into "plain and unambiguous" Section 1982 terms and standards which simply are not there.

How can the words "the same right as is enjoyed by white citizens," used in Section 1982, encompass any of the rights accorded blacks by this decision? White citizens do not enjoy a right to purchase homes at "reasonable prices." White citizens do not enjoy a right to purchase homes at a price which an appraiser opines is "reasonable" or "fair." They do not enjoy a right to purchase a home from one seller at the same

* A provision limiting the section to state action.

price at which some "comparable" home is sold by someone else. They do not enjoy a right to purchase a home at a price which will give the seller the same net, much less gross profit percentage as he or some "related" seller had in selling other homes in the same or any other area. White citizens buy real property at a price determined by what they are willing to pay and the seller is willing to accept and thus pay a price determined by the law of supply and demand. The opinion reads all of the above enumerated rights into Section 1982, even though none is a right enjoyed by whites.* Thus, the Seventh Circuit read into Section 1982 that which it does not contain, and read out of the American economy the law of supply and demand whenever one deals with blacks.

Petitioners argued before the Seventh Circuit that it was construing Section 1982 to include that which it does not contain and to mean exactly the opposite of what it says and that such construction would render the statute violative of the first essential of petitioners' Fifth Amendment due process rights under this Court's repeated decisions: *Connally* v. *General Construction Company*, 269 U. S. 385, 391** (1926); *Giaccio* v. *Pennsylvania*, 382 U. S. 399, 402, 403*** (1966); see also, *United States* v. *L. Cohen Grocery Company*, 255 U. S. 81 (1921); *Cline* v. *Frink Dairy Company*, 274 U. S. 445 (1927); *Cramp* v. *Board of Public Instruction*, 368 U. S. 278 (1961); *Rowan* v. *United States Post Office Department*, 397 U. S. 728 (1970).

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* In *Bush* v. *Kaim*, 297 F. Supp. 151, 162 (N. D. Ohio, 1969) the court said: "The statute guarantees to Negroes only the 'same right' as is enjoyed by white citizens. It does not purport to grant to Negroes rights which exceed those of white or other citizens."

** "And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

*** It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain of the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case."

The Seventh Circuit cavalierly rejected this argument saying we have not here a penal statute but a statute to be read as broad as its language. The problem with this decision is that the Seventh Circuit read the statute *broader* than its language holding that sales to blacks must be made at "reasonable" prices* and disregarded this Court's repeated holdings that whether statutes be civil or penal or whether they are to be read broadly or narrowly, they must all be construed within the framework of the Fifth Amendment right to due process—*they must give fair warning of the proscribed conduct.* Thus, as this Court stated in *Small Co.* v. *American Sugar Refining Co.*, 267 U. S. 233, 239 (1925):

> "The defendant attempts to distinguish those cases because they are criminal prosecutions. But that is not an adequate distinction. The ground or principle of the decisions was not such as to be applicable only to criminal prosecutions. It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all. Any other means of exaction, such as declaring the transaction unlawful or stripping a participant of his rights under it, was equally within the principle of those cases." (267 U. S. 239.)

See also: *Giaccio* v. *Pennsylvania*, 382 U. S. 399 (1966); *Boutilier* v. *Immigration and Naturalization Service*, 387 U. S. 118 (1967); *Jordan* v. *De George*, 341 U. S. 223 (1951).

No one reading the statute could have surmised that the Seventh Circuit's interpretation was contemplated by the "plain

* Apparently and understandably concerned that petitioners' right to due process could not so perfunctorily be swept aside and that a requirement of "reasonableness" which it read into the statute is itself fatally vague and indefinite, the decision finds that *Levy Leasing Co.* v. *Siegel*, 258 U. S. 242 (1922), involving a statute prohibiting "unjust, unreasonable, and oppressive rent," stands for the proposition that the word "reasonableness" standing alone, is constitutionally definite and satisfies the demands of due process. But that is beside the point because unlike the statute in *Levy*, Section 1982 does not contain the word "reasonableness" or any variation thereof and thus the Court's discussion of *Levy* is irrelevant. Moreover, *Levy Leasing* involved a statute containing standards for determining just, reasonable and unoppressive rent.

and unambiguous" words that blacks shall have "the same right" as whites. So interpreted it conflicts with this Court's holding in *Jones* v. *Mayer Co.*, other decisions of this Court and offends due process.

Moreover, the Seventh Circuit's *own* test of constitutionality would render the construction it placed on Section 1982 a violation of due process, since criminal prosecutions are sanctioned for violation of Section 1982 by 18 U. S. C. § 241. Indeed, a criminal indictment charging violation of Section 1982 was upheld under the prior form of 18 U. S. C. § 241 in *United States* v. *Morris*, 125 F. 322 (E. D. Ark. E. D. 1903).

The decision strikes at the heart of our economic system. Although the law of supply and demand operates in sales to whites, it is nullified when blacks are involved. Thus, the profit motive, usually expected to attract effort and capital to where the need is greatest, no longer exists. Instead, a barrier has been erected to providing housing where the demand is great because of the risk that the seller's price will later be deemed unreasonable, notwithstanding the absence, as here, of fraud, usury or unconscionability.* In short, it is doubtful that entrepeneurs will decide that entering the black markets which exist in almost every area of the country is worth the risk.

In addition, the rationale announced here that discrimination is to be determined not by the fact that one treats all equally, but by how another treats someone else, appears fully applicable to all transactions with non-whites** and to other civil rights acts.

Only two months after this decision was handed down, *Business Week* reported that it is viewed as precedent for, and is the impetus of, scores of other actions throughout the country already in various stages of preparation, charging violations of civil rights in a gamut of transactions with blacks including the payment by Southern cities to black garbagemen

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* See note on page 4, *supra*.

** September 21, 1974, at pages 72-73.

of lower salaries than New York and San Francisco pay white garbagemen.

Because of the broad implications of the decision and because if not reviewed, it will result in a miscarriage of justice as far as petitioners are concerned, review by this Court is appropriate and necessary at this time.

II.

The Opinion Creates Another Unique Principle of Law in Holding That a Claimed Violation of Civil Rights by a Corporation, Without More, Authorizes Disregarding Separate Corporate Entities and Automatically Imposes Liability on the Defendant Corporations' Officers, Directors and Shareholders. These Are Federal Questions of Substance Not Heretofore Determined by This Court.

Review is also necessary because the Seventh and Ninth Circuit are now in conflict as to personal liability of shareholders, officers and directors for civil rights violations committed by corporations. Here the Court held that a violation of civil rights by a corporation is such an exceptional circumstance as to automatically impose personal liability on its officers, directors and shareholders. In *Spears* v. *Transcontinental Bus System*, 226 F. 2d 94, 98 (1955), the Ninth Circuit held that a corporation's civil rights violation was not such an exceptional circumstance as would justify imposing liability upon the corporation's sole or controlling shareholder (in that case its parent corporation), even though a civil rights violation had clearly been committed.

This Court should now resolve this conflict among the Circuits as to personal liability for corporate civil rights violations for the guidance of the lower courts in handling the avalanche of suits which will be spawned by the Seventh Circuit's unprecedented construction of Section 1982. It should also be noted that its equally unprecedented holding with respect to the liability

of individuals* would justify joining in such suits all of the officers, directors and stockholders of any corporation alleged to have violated someone's civil rights.

The Ninth Circuit's treatment in *Spears* of affiliated corporations is also in conflict with the Seventh Circuit's ruling concerning the Deerfield joint venture and the corporation which it characterized as "related" to petitioners. The Ninth Circuit held that even the absolute control of a parent over its subsidiary together with joint participation in certain business conduct would not justify a disregard of the separate legal entities of different corporations in order to attribute the acts of one to another. Under its decision, this can be done only in exceptional circumstances such as those disclosed in *Ohio Tank Car Co.* v. *Keith Railway Equipment Co.*, 148 F. 2d 4 (1945), *cert. denied*, 326 U. S. 730 (1945), where two corporations, which had identical officers, identical directors, and whose stock was owned in identical proportions by the same persons were separately organized for the specific purpose of evading the Elkins Act.

Here, the Seventh Circuit disregarded the separate entities of petitioners and the "related" sellers, and attributed their conduct to petitioners. This was done even though these corporations had not been formed for any improper purpose, and despite the fact that the officers, directors and shareholders of petitioners and the "related" companies were not identical. Indeed, one of the "related" companies whose practices were attributed to petitioners, P. F. S. Development Co., was uncontrovertibly unrelated to all but one of the petitioners, and even that "relationship" highlights the conflicting approaches of the

* The only authority which the Seventh Circuit cited for its imposition of personal liability was its prior decision in *Ohio Tank Car Co.* v. *Keith Railway Equipment Co.*, 148 F. 2d 4 (1945), which treated two corporations as one for purposes of proving a statutory violation where it was shown that the two were organized for the specific purpose of evading the statute. It did not address the issue of personal liability of individuals for either corporation's statutory violation.

Ninth Circuit in *Spears* and the Seventh Circuit here. P. F. S. was "related" only to petitioner Universal Builders and then only in the sense that the President and controlling shareholder of Universal was, for a few months, an officer and a 50% shareholder of P. F. S., and a minority shareholder for a few more months. *Nothing more.* Yet the Seventh Circuit held that the conduct of P. F. S. was to be attributed to *all* petitioners for purposes of developing a comparison of gross profit percentages which would show *all* petitioners' violation of Section 1982.

The Seventh Circuit's treatment of the "related" sellers is also at variance with the prevailing approach of the lower courts, in actions under other statutes, of refusing to treat affiliated corporations as a single entity for evidentiary purposes of comparing prices. For example, the price of a parent to one customer was not permitted to be compared with the price of its subsidiary to another in an action under the Robinson-Patman Act. *Baim & Blank, Inc.* v. *Philco Corp.*, 148 F. Supp. 541 (E. D. N. Y. 1957).

In view of the many parent-subsidiary and "brother-sister" relationships among both publicly and closely held corporations throughout the country, this Court should now, for the guidance of the lower courts in handling future civil rights actions, also determine whether the generally prevailing standards apply in determining the evidentiary propriety of comparing costs or prices of affiliated corporations, or whether, as the decision here holds, unique standards automatically are applicable in actions under the civil rights laws.

III.

The Seventh Circuit's Decision With Regard to the Statute of Limitations Is in Direct Conflict with the Decision of This Court in Zenith Radio Corporation v. Hazeltine Research, Inc., 401 U. S. 321 (1971) and Those of Other Circuits.

The Seventh Circuit also held that the statute of limitations which requires that actions brought for violations of Section 1982 "be commenced within 5 years next after the cause of action *accrued*"* did not begin to run when each contract was executed, but only when each was terminated (the terms were generally 25-30 years) reasoning that until the contract was terminated petitioners were reaping the benefit of the unlawful price.**

But this is not the test. A cause of action accrues when an act is committed causing injury and damage. If the act will cause future damage, the cause of action for future damage accrues when that damage may be reasonably ascertained so that a court may grant relief without resort to speculation. *Zenith Radio Corporation* v. *Hazeltine Research, Inc.*, 401 U. S. 321, *Reh. Den.* 401 U. S. 1015 (1971); *Ansul Company* v. *Uniroyal, Inc.*, 448 F. 2d 872, 884-885 (2d Cir. 1972); *Poster Exchange, Inc.* v. *National Screen Service Corp.*, 456 F. 2d 662, 667-668 (5th Cir. 1972); *Railing* v. *United Mine Workers of America*, 445 F. 2d 353 (4th Cir. 1971).

Here, the violation, the injury, the damage all are determined by one common denominator, the price. The Seventh Circuit

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* Ill. Rev. Stat. Ch. 83, Sec. 15, par. 16.

** The only thing which occurred after the contracts were executed was that respondents made installment payments under the agreements. However, it is well established that mere collection of monies due under an installment contract does not extend the statute of limitations. *Lowell Wiper Supply* v. *Helen Shop*, 235 F. Supp. 640 (S. D. N. Y., 1964). Accord: *Skouras Theatres Corp.* v. *Radio-Keith-Orpheum Corp.*, 193 F. Supp. 401 (S. D. N. Y., 1961), and *Steiner* v. *20th Century-Fox Film Corp.*, 232 F. 2d 190 (9th Cir. 1956).

itself held that respondents had *prima facie* shown petitioners' violation by measuring their price against the opinion of an appraiser, the price of a "comparable" home or gross profit percentages on the sale. Appraisers, "comparable homes," and the books and records disclosing gross profits, were all available on the day the buyer signed his contract. Comparisons and computations proving the violation here defined and the extent thereof could have been made then, with no less certainty and precision than such comparisons and computations were made at the trial held in 1972 or can be made on any future day.

If petitioners prices were unlawful, they were unlawful when the contracts were signed. It was then, if at all, that respondents' civil rights were violated. Respondents were then injured, all their damages, present and future were ascertainable and the Court could have granted full relief without resort to speculation. It was then the cause of action accrued and the statute began to run.*

On the other hand, if respondents could not have proven and the court could not have ascertained the violation, injury and damage and fashioned the same remedy and granted the same relief the day the contract was signed, how could they do so in 1969 when the suit was filed, in 1972 when it was tried or even today because the vast majority of the contracts have not been terminated?

In *Zenith Radio Corporation* v. *Hazeltine Research, Inc.*, 401 U. S. 321, Reh. Den. 401 U. S. 1015 (1971), this court stated at page 338:

> "Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business. (Citations omitted) * * * Thus, if a plaintiff feels the adverse impact of an antitrust conspiracy on a particular date, a cause of action immediately

* If, on the other hand, the statute of limitations begins to run *only when each contract is terminated*, as the Seventh Circuit held, it must necessarily follow that the suit is premature and should have been dismissed as to all members of the class (by far the greatest percentage) whose contracts have not terminated.

accrues to him to recover all damages incurred by that date and all provable damages that will flow in the future from the acts of the conspirators on that date. To recover those damages, he must sue within the requisite number of years from the accrual of the action."

The decision of the Seventh Circuit cannot be squared with the concept and purpose of statutes of limitations.* More important, it is in direct conflict with the *rationale* underlying and the prior decisions of this Court and those of other circuits.

Review is required not only because of this conflict and the decision's impact on petitioners, but if Section 1982 means what the Seventh Circuit held it to mean, because of the impact it will have on thousands and thousands of other real estate transactions involving blacks which will now come under attack.

IV.

The Opinion Contains Such a Novel Construction of Section 1982 That It Should Not Be Applied Retroactively.

If this decision is allowed to stand unreviewed and applied retroactively, the impact of this truly new and heretofore unimagined principle of law upon the administration of justice and the hardship that will be worked upon petitioners and those others who relied upon the language of Section 1982 are apparent.

One national publication** already reports that cases are in the works applying this decision to a vast number of pricing practices. That article points out that the impact alone on the

* Statutes of limitations are statutes of repose. They are designed to protect citizens from stale and vexatious claims and to make an end to the possibility of litigation after the lapse of a reasonable time and constitute "a meritorious defense in itself serving the public interest." *Guarantee Trust Co. of New York* v. *United States*, 304 U. S. 126, 82L. Ed. 1224, 1230 (1938).

** *Business Week*, September 21, 1974, pages 72-73.

building industry could cost millions of dollars, because blacks have been shifting from renting to home owning during a period when the percentage of white homeowners remained relatively static. It reports that census figures record 2,568,000 home owning black households (or 42% of all black households) in 1970 and that Housing and Urban Development Department officials believe the trend has accelerated in the past four years as more blacks have moved into the middle class. These purchasers are potential plaintiffs in the federal courts in view of the Seventh Circuit's decision concerning the statute of limitations.

The injustice of applying this decision to the claimed conduct of petitioners, who began to sell real estate to blacks sixteen years before this pronouncement, would constitute gross inequity by far more severe than the effect of not doing so on respondents. Certainly petitioners acted in good faith in selling to all who wished to purchase regardless of race. Respondents freely and voluntarily entered into their agreements to purchase homes from petitioners after comparison shopping of other builders and, in many instances, with the advice of their attorneys. Obviously, respondents had no reason to believe that, unlike white citizens, they had a right to have the contract price reduced if they could at some time in the future find an appraiser to testify that the price exceeded his opinion of value or the price of another house sold to a white person, which an appraiser would opine represented comparable property or on the basis that petitioners' *gross* profit percentage was higher than that of some other companies.

The factors considered in determining retroactive application of a decision set forth in *Chevron Oil Company* v. *Huson*, 404 U. S. 97 (1971) call for non-retroactivity of this decision and require review by this Court.

CONCLUSION.

Petitioners pray that this petition be granted.

Respectfully submitted,

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APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS,
For the Seventh Circuit.

No. 72-1655

SIDNEY CLARK AND JULIA CLARK, ET AL.,
Plaintiffs-Appellants.

vs.

UNIVERSAL BUILDERS, INC., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 69 C 115
Joseph Sam Perry, *Judge.*

Argued October 24, 1973—Decided July 26, 1974

Before SWYGERT, *Chief Judge*, SPRECHER, *Circuit Judge*, and GRANT, *Senior District Judge.**

SWYGERT, *Chief Judge*. This appeal is from a grant of a directed verdict for defendants at the close of the plaintiff's case in chief. Plaintiffs are a class of black citizens who purchased newly constructed houses in Chicago from defendants under land installment contracts during the period from 1958 to 1968. Defendants include the building contractor of the houses and the various land companies through which the houses were

* Senior District Judge Robert A. Grant of the Northern District of Indiana is sitting by designation.

sold to plaintiffs.[1] In the district court plaintiffs claimed that as a result of intense racial discrimination in Chicago and its metropolitan area there existed at all pertinent times a housing market for whites and a separate housing market for blacks, the latter confined to a relatively small geographical area in the central city. Plaintiffs contended that the demand among blacks for housing greatly exceeded the supply of housing available in the black market and that the defendants exploited this situation by building houses in or adjacent to black areas and selling the houses to plaintiffs at prices far in excess of the amounts which white persons paid for comparable residences in neighboring urban areas, and on onerous terms far less favorable than those available to white buyers of similar properties, all in violation of plaintiffs' rights under the Thirteenth and Fourteenth Amendments and under the Civil Rights Act of 1866.[2] Plaintiffs' exploitation theory of liability was sustained by District Judge Hubert Will as stating a claim for relief under section 1982 of the Civil Rights Act of 1866. Accordingly, Judge Will denied defendants' motion to dismiss plaintiffs' complaint. *Contract Buyers League* v. *F & F Investment*, 300 F. Supp. 210 (1969), *aff'd on other grounds*, 420 F.2d 1191 (7th Cir. 1970), *cert. denied*, 400 U.S. 821 (1970). The case then went to trial before District Judge Joseph Sam Perry, and plaintiffs, pursuant to Judge Will's approval of their exploitation theory of liability under section 1982, presented evidence before a jury of defendants' alleged exploitation of the discriminatory housing situation prevalent in Chicago during the

1. The builder of the homes was Universal Builders, Inc. The land was owned and sales were made in the names of various land companies: Larchmont Home Development Co.; Rosewood Corporation; Independence Homes, Inc.; Hamilton Corporation; Lawson Corporation; Jarvis Homes, Inc.; and Chatham Town Homes, Inc. Universal entered into joint venture agreements with each of the land companies whereby Universal agreed to build homes on the land companies' lots.

2. Although plaintiffs brought their civil rights action under the federal Civil Rights Act, 42 U.S.C. §§ 1981, 1982, 1983 and 1985(3) they have grounded their appeal on 42 U.S.C. § 1982.

period 1958 through 1968. Upon completion of plaintiffs' case in chief, Judge Perry granted defendants' motion for directed verdict, holding in opposition to Judge Will's theory of the case that:

> . . . [C]ounsel for the plaintiffs have not painted a pretty picture of the defendants, but that picture is a picture of exploitation for profit, and not racial discrimination.
>
> * * * * *
>
> Nowhere in the six weeks' trial is there one scintilla of evidence that the defendants or any of them or their agents ever refused to sell to a white person or a black person or a non-white person any house or refused to sell one or the other at a higher or lower price, absolutely no positive evidence of discrimination in this record.
>
> * * * * *
>
> Accordingly, for want of any evidence in support of the complaint, the motion for a directed verdict by all of the defendants now on trial is hereby granted, and the complaint of all of the plaintiffs is hereby dismissed as to all of the defendants.

Under Judge Perry's theory of the case, absent evidence of defendants' sales of the same or similar housing to whites on more favorable terms and prices, namely, the traditional theory of racial discrimination, plaintiffs failed to make out a case of liability under section 1982.

Plaintiffs raise numerous issues in this appeal the most important of which of course is the correctness of the grant of a directed verdict for the defendants. The other issues can broadly be categorized as challenges to the correctness of certain of the trial judge's evidentiary rulings and other procedural rulings.

In judging the propriety of the grant of the directed verdict, we are confronted with two issues. We must first resolve the conflict as to the scope of section 1982. That is, we must determine whether section 1982 covers only the so-called traditional type of discriminatory conduct, or whether a claim may

be stated under section 1982 by proof of exploitation of a discriminatory situation already existing and created in the first instance by the action of persons other than defendants. If we determine that section 1982 is violated under the latter theory, we then must determine whether the evidence, both the admitted evidence and erroneously excluded evidence, when viewed in the light most favorable to plaintiffs, together with all inferences that may be reasonably drawn therefrom, is such that it can be found that plaintiffs have made out a *prima facie* case.

Section 1982 of the Civil Rights Act of 1866 provides:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.[3]

Plaintiffs' "exploitation" theory of liability under this section can briefly be restated as follows: As a result of racial discrimination there existed two housing markets in Chicago, one for whites and another for blacks, with the supply of housing available in the black market far less than the demand. Defendants entered the black market selling homes for prices far in excess of their fair market value and far in excess of prices

3. Section 1982 in its original form was part of section 1 of the Civil Rights Act of 1866. That section provided:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all persons born in the United States and not subject to any foreign power, . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary, notwithstanding.

which whites pay for comparable homes in the white market and on more onerous terms than whites similarly situated would encounter. Plaintiffs contend that by so acting defendants seized upon and took advantage of the opportunity created by racial residential segregation to exploit blacks in violation of section 1982.

It is asserted that to countenance such actions by the defendants would be in direct contravention of the express language of section 1982 which provides by clear implication that black citizens "shall have the same right . . . as is enjoyed by white citizens . . . to . . . purchase . . . real . . . property." Moreover, plaintiffs claim that a ruling which would hold defendants' asserted acts of exploitation to be outside of the coverage of section 1982 would be contrary to the Supreme Court's declaration in *Jones* v. *Mayer Co.*, 392 U.S. 409, 443 (1968), and that section 1982 was meant to be a vehicle through which "to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man."

Defendants contend that absent a showing of the traditional form of discrimination, namely, that defendants refused to sell to blacks because of their race, or offered to sell the same houses to whites at lower prices or on more favorable terms than they offered to sell to blacks, plaintiffs have not made out a case under section 1982. Defendants assert that the houses they sold to plaintiffs in the black market were available to whites and would have been sold on the same terms and for the same prices as sales to the black plaintiffs. Therefore, defendants argue, plaintiffs enjoyed "the same right" as enjoyed by white citizens to purchase houses in the black market. Moreover, it is urged that other sellers and not defendants discriminated against plaintiffs in the first instance by refusing to sell to plaintiffs housing in other urban areas, thereby excluding them from the white market. The defendants claim that an extension of section 1982 so as to proscribe their alleged acts of exploitation would be tantamount to holding defendants

liable for the discrimination of others without a showing of any discrimination by defendants. With respect to the Supreme Court's decision in *Jones* v. *Mayer Co.*, the defendants suggest that it lends no support to the plaintiffs' desired interpretation of section 1982. Rather, defendants view *Jones* v. *Mayer Co.*, as authority for their contention that section 1982 prohibits only the so-called traditional type of discrimination and does not encompass plaintiffs' theory of exploitation liability. Also, defendants urge that plaintiffs' interpretation of section 1982 would render that section unconstitutionally vague and would expose defendants to risk or detriment without fair warning of the nature of the proscribed conduct. It is on the basis of these arguments that defendants claim that no case can be made under section 1982 for exploitation absent a showing that defendants offered to sell the same or similar homes to whites at lower prices and on more favorable terms than they made available to blacks. We do not agree.

At the outset we note that section 1982 is framed in broad yet clear language. It provides that:

> All citizens of the United States shall have the same right . . . as is enjoyed by white citizens thereof to . . . purchase . . . real . . . property.

Facially, therefore, the scope of section 1982 would appear to be rather far reaching; indeed such a reading of the statute is supported by the Supreme Court's interpretation of section 1982 in *Jones* v. *Mayer Co.*, 392 U.S. 409 (1968). In that case the Court was confronted with questions as to the scope and constitutionality of section 1982. The plaintiff in that case, a black person, brought an action pursuant to section 1982 claiming that the defendants refused to sell him a house on the basis of his race. The district court dismissed the plaintiff's complaint, and the court of appeals affirmed, concluding that section 1982 applied only to state action and not private action. The Supreme Court rejected the argument for a narrow construction of section 1982, holding in broad language:

> [T]hat § 1982 bars *all* racial discrimination, private as well as public, in the sale or rental of property, and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment. 392 U.S. 413 [Emphasis in original].

The Court went on to note that section 1982 was an attempt by Congress to provide "that the right to purchase and lease property was to be enjoyed equally throughout the United States by Negro and white citizens alike" and that Congress "plainly meant to secure that right against interference from any sources whatever, whether government or private." 392 U.S. at 423-24. The Court concluded its analysis by stating that section 1982 must be accorded " 'a sweep as broad as its language.' " 392 U.S. at 437. Observing that "when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery," the Court proceeded to uphold the constitutionality of section 1982 stating:

> Negro citizens, North and South, who saw in the Thirteenth Amendment a promise of freedom—freedom to "go and come at pleasure" and to "buy and sell when they please"—would be left with "a mere paper guarantee" if Congress were powerless to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man. At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep. 392 U.S. 443.

Clearly, the Court's decision in *Jones* v. *Mayer Co.* does not, contrary to defendants' assertions, detract from the plaintiffs' contention as to the scope of section 1982. Rather, the decision is support for plaintiffs' theory for in *Jones* the Court viewed section 1982 as a broad based instrument to be utilized in

eliminating all discrimination and the effects thereof in the ownership of property. Accordingly, *Jones* v. *Mayer Co.* does not stand as an obstacle to plaintiffs' case, but supports it.

Defendants insist that section 1982 cannot be construed to encompass other than the traditional type of discrimination, that is, that defendants offered to sell to whites on more favorable terms and prices than to plaintiffs. Keeping in mind, the Supreme Court's admonition in *Lane* v. *Wilson*, 307 U.S. 268, 275 (1939), that the Constitution and statutes promulgated in its enforcement nullify "sophisticated as well as simple-minded modes of discrimination," we reject defendants' notion of adherence to a strict, rigid, and traditional type of discrimination. We need not resort to a labelling exercise in categorizing certain activity as discriminatory and others as not of such character for section 1982 is violated if the facts demonstrate that defendants exploited a situation created by socioeconomic forces tainted by racial discrimination. Indeed, there is no difference in results between the traditional type of discrimination and defendants' exploitation of a discriminatory situation. Under the former situation blacks either pay excessive prices or are refused altogether from purchasing housing, while under the latter situation they encounter oppressive terms and exhorbitant prices relative to the terms and prices available to white citizens for comparable housing.

To avoid this conclusion, defendants contend that even though the results obtained under both the traditional and exploitation theories are similar, they come about through significantly different means. Under the traditional theory a black man is denied the "same right" as a white man in that the seller offers to sell the same house to each but at different prices and terms due to the differences in race of the prospective buyer. It is defendants' position that they offered the plaintiffs the same terms and prices they would offer whites. Therefore it is asserted that plaintiffs had the same right as white citizens. This argument ignores current realities of racial psychology and

economic practicalities. Defendants can find no justification for their actions in a claim that they would have sold on the same terms to those whites who elected to enter the black market and to purchase housing in the ghetto and segregated inner-city neighborhoods at exhorbitant prices, far in excess of prices for comparable homes in the white market. It is no answer that defendants would have exploited whites as well as blacks. To accept defendants' contention would be tantamount to perpetuating a subterfuge behind which every slumlord and exploiter of those banished to the ghetto could hide by a simple rubric: The same property would have been sold to whites on the same terms.

Defendants urge that other sellers and not they were the active agents of discrimination. That is, blacks were excluded from the white market by other sellers who refused to sell to plaintiffs and that accordingly plaintiffs' action lies solely against those other owners and real estate operators and not the defendants. But, we repeat, defendants cannot escape the reach of section 1982 by proclaiming that they merely took advantage of a discriminatory situation created by others. We find repugnant to the clear language and spirit of the Civil Rights Act the claim that he who exploits and preys on the discriminatory hardship of a black man occupies a more protected status than he who created the hardship in the first instance. Moreover, defendants' actions prolong and perpetuate a system of racial residential segregation, defeating the assimilation of black citizens into full and equal participation in a heretofore all white society.[4] Through the medium of exhorbitant prices and severe, long-term land contract terms blacks are tied to housing in the ghetto and segregated inner-city neighborhoods from which they

4. As we recently stated in *Barrick Realty, Inc.* v. *City of Gary, Indiana, No.* 73-1279 (Jan. 24, 1974) at p. 5:

> [T]he goal of our national housing policy is to "replace the ghettos with 'truly integrated and balanced living patterns' " for persons of all races.

Defendants' alleged actions are in conflict with such an effort.

can only hope to escape someday without severe financial loss. By demanding prices in excess of the fair market value of a house and in excess of what whites pay for comparable housing, defendants extract from blacks resources much needed for other necessities of life, thereby reducing their standard of living and lessening their chances of escaping the vestiges of a system of slavery and oppression.[5] Indeed, defendants' activity encourages overt discrimination by others since it deflects or forestalls a frontal attack on such discrimination by offering the long-oppressed black an unattractive yet alternative choice to that of a confrontation for equal buyers' rights in a white neighborhood.

Defendants in effect contend that this is solely a matter of economics and not of discrimination. We cannot accept this contention for although the laws of supply and demand may function so as to establish a market level for the buyer in the black housing areas, it is clear that these laws are affected by a contrived market condition which is grounded in and fed upon by racial discrimination—that is, the available supply of housing is determined by the buyer's race. In other contexts the law has prevented sellers from charging whatever the market will bear when special circumstances have occasioned market shortages or superior bargaining positions. In such instances sellers were denied the opportunity to exploit others merely because the opportunity existed.

Contrary to the trial court's stance, the shortage of housing here was triggered not by an economic phenomenon but by a

5. Charging prices greater than white citizens pay for comparable housing means that blacks are required to dedicate a greater portion of their income to housing than White citizens, leaving less to spend on other necessary items such as education, medical care, food, clothing, home improvements and recreation. As a result, the exploitation of the dual housing market assists in the relegation of blacks to a continuing position of social inequality and inferiority while those who exploit the dual housing market enjoy the benefits of enormous wealth exacted from black citizens.

pattern of discrimination that has no place in our society.[6] Accordingly, neither prices nor profits—whether derived through well-intentioned, good-faith efforts or predatory and unethical practices—may reflect or perpetuate discrimination against black citizens. We agree with Judge Will's statement that "there cannot in this country be markets or profits based on the color of a man's skin." *Contract Buyers League* v. *F & F Investment*, 300 F.Supp. 210, 216 (N.D. Ill. 1969).[7] Price and profit differentials between individual buyers may be justified on a multitude of grounds; for example, the prospective purchaser's reputation

6. In analyzing the market shortage confronting plaintiffs the trial judge stated:

> The same economic forces and the law of supply and demand create and destroy markets for building boom towns in time of war and dying ghosts towns in time of peace. The same thing occurs in other economic phenomena, such as a gold rush, a uranium strike, a new highway, a railway or the St. Lawrence Waterway. One area is distressed; another is incremented by increased activity.

The "economic phenomena" referred to by the trial judge have nothing to do with the race of the persons involved; the financial impact upon the citizenry is the same regardless of their color. The impact of the phenomenon of racial discrimination, however, falls solely on the black citizenry.

7. Judge Will accurately depicted the import of section 1982 and the *Jones* v. *Mayer Co.* decision when he stated:

> [T]he language and logic of *Jones* and the constitutional application that the Supreme Court regarded as the source of the Civil Rights Act of 1866 must be equally applicable to the discrimination alleged in this case. The Court found that the legislative history of the 1866 Act demonstrated the Congressional intent to ensure that the former slaves could participate fully in a national economy. It was the Court's conclusion that the existence of a black market distinct from a white market was the *de facto* vestige of what the Congress in 1866 intended to abolish as a critical means of making the black man a free man. The conviction recognized was that the obliteration of the social system where one man was the slave of another required as a fundamental matter that our economy be undifferentiated as to the race of a man. The Court thus understood Section 1982 as implementing the Thirteenth Amendment "to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man." 300 F.Supp. at 215.

or his financial position and potential earning power. But price or profit may not turn on whether the prospective buyer has dark or light pigmentation.[8]

Defendants urge that acceptance of plaintiffs' asserted interpretation of section 1982 would render the statute unconstitutional and that the standards of liability utilized to deploy such an expanded interpretation would be unconstitutionally vague and indefinite. They argue that a narrow interpretation is compelled so as to sustain the constitutionality of the statute and to prevent the exposure of "a potential actor to some risk or detriment without giving him fair warning of the nature of the proscribed conduct." *Rowan* v. *Post Office Dept.*, 397 U.S. 728, 740 (1970). Defendants' argument misses the mark for we have not here a penal statute to be strictly construed. Rather, we have a civil statute which is remedial in nature and, as viewed by the Supreme Court, is to be accorded " '. . . a sweep as broad as its language.' " *Jones* v. *Mayer Co.*, 392 U.S. 409, 437 (1968) citing *United States* v. *Price*, 383 U.S. 787, 801 (1966).

With respect to the standard of liability upon which a violation of the statute may be predicated within the factual context here depicted, we hold that the benchmark for guiding a seller's

8. Similar to our ruling in *Smith* v. *Sol D. Adler Realty Co.*, 436 F.2d 344 (7th Cir. 1970), that race may not be a factor in an apartment rental decision, we now hold that race is an impermissible factor in arriving at the price to be charged for new residential housing. In *Adler* we held:

> In Jones v. Alfred H. Mayer, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968), the Court held that § 1982 of the Act of 1866, as amended, *supra*, applies to *all* racial discrimination in the sale or rental of property, private as well as governmental. The Court found the language of § 1982 to be plain and unambiguous and that Congress meant exactly what it said, *i.e.*, that "all citizens * * * shall have the same right * * * as is enjoyed by white citizens" to lease real property. We read this to hold that the "same right" means that race is an impermissible factor in an apartment rental decision and that it cannot be brushed aside because it was neither the *sole* reason for discrimination nor the total factor of discrimination. We find no acceptable place in the law for partial racial discrimination. 436 F.2d 349-50 [Emphasis in original].

conduct in the black market is reasonableness. That this is a constitutionally sufficient standard by which to gauge one's conduct in the real estate market was long ago recognized by the Supreme Court in *Levy Leasing Co.* v. *Siegel*, 258 U.S. 242 (1922). In that case the Court held that the usage of a standard prohibiting ". . . reserving unjust, unreasonable and oppressive" rent and terms of renting was constitutionally definite so as to satisfy the demands of due process. Commenting on the *Levy Leasing Co.* decision, the Court in *Small Co.* v. *American Sugar Refining Co.*, 267 U.S. 233, 241-42 (1925), stated:

> Real property, particularly in a city, comes to have a recognized value, which is relatively stable and easily ascertained. It also comes to have a recognized rental value—the measure of compensation commonly asked and paid for its occupancy and use—the amount being fixed with due regard to what is just and reasonable between landlord and tenant in view of the value of the property and the outlay which the owner must make for taxes and other current charges. These are matters which in the course of business come to be fairly well settled and understood. A standard thus developed and accepted in actual practice, when made the test of compliance with legislative commands or prohibitions, usually meets the requirements of due process of law in point of being sufficiently definite and intelligible.

By demanding prices far in excess of a property's fair market value and far in excess of prices for comparable housing available to white citizens the seller ventures into the realm of unreasonableness. The statute does not mandate that blacks are to be sold houses at the exact same price and on the exact same terms as are available to white citizens. Reasonable differentials due to a myriad of permissible factors can be expected and are acceptable. But the statute does not countenance the efforts of those who would exploit a discriminatory situation under the guise of artificial differences.

The practices that have befallen plaintiffs have long besieged other black citizens. In the year 1962 the United States Commission on Civil Rights recognized that:

> Throughout the country large groups of American citizens—mainly Negroes, but other minorities too—are denied an equal opportunity to choose where they will live. Much of the housing market is closed to them for reasons unrelated to their personal worth or ability to pay. New housing, by and large, is available only to whites. And in the restricted market that is open to them, Negroes generally must pay more for equivalent housing than do the favored majority. "The dollar in a dark hand" does not "have the same purchasing power as a dollar in a white hand."[9]

When a seller in the black market demands exhorbitant prices and onerous sales terms relative to the terms and prices available to white citizens for comparable housing, it cannot be stated that a dollar in the hands of a black man will purchase the same thing as a dollar in the hands of a white man. Such practices render plaintiffs' dollars less valuable than those of white citizens—a situation that was spawned by a discarded system of slavery and is nurtured by vestiges of that system. Courts in applying section 1982 must be vigilant in preventing toleration of this deplorable circumstance.

We hold accordingly that plaintiffs state a claim under section 1982 since they allege that (1) as a result of racial residential segregation dual housing markets exist and (2) defendant sellers took advantage of this situation by demanding prices and terms unreasonably in excess of prices and terms available to white citizens for comparable housing. If the plaintiffs sustain the burden of proof on these elements they make out a *prima facie* case, whereupon, as recently made clear by the Supreme Court, the burden of proof shifts to the defendants "to articulate some legitimate, nondiscriminatory reason" for the price and term

9. 1961 United States Commission on Civil Rights Report, Part IV, at 1.

differential. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973).

II.

Having determined the substantive framework upon which an action may be brought pursuant to section 1982 we address ourselves to the correctness of the directed verdict entered in favor of the defendants at the close of plaintiffs' case in chief. Keeping in mind that we must view all the evidence, plus the reasonable inferences to be drawn therefrom, in the light most favorable to the plaintiffs, *Hannigan* v. *Sears, Roebuck & Co.*, 410 F.2d 285, 287 (7th Cir.), *cert. denied*, 396 U.S. 902 (1969), we hold that the admitted evidence was sufficient to establish a *prima facie* case under section 1982 pursuant to the exploitation theory of liability and, accordingly, warranted submission of the issues to the jury for resolution. Moreover, we rule that on the basis of the evidence erroneously excluded by the trial judge the plaintiffs have made out a case for section 1982 liability under the so-called traditional theory of discrimination and that, therefore, a directed verdict for defendants on this separate ground was likewise improperly granted. To demonstrate the error committed we proceed to review the evidence adduced at trial.

There was sufficient evidence to establish, *prima facie*, the existence of dual housing markets in the Chicago metropolitan area as a result of racial residential segregation. Dr. Karl E. Taeuber, a professor of sociology, testified as an expert witness about the results of his extensive research on the dispersion of population in the city of Chicago. His statistical analysis indicated that Chicago was a highly segregated city and that there was a very high degree of residential segregation between whites and blacks. Moreover, despite the decrease of white population in the city accompanied by a rapid increase of the black population, the supply of new housing available to whites was much greater than that available to blacks. Also, during the pertinent

time period the expanding suburban housing market was limited almost completely to whites. Dr. Taeuber testified that the main obstacle to the movement of blacks into the white areas of Chicago and suburban residential areas was the high degree of discrimination against blacks in the white market. As a result the supply of housing available to whites was far greater in both absolute and relative terms to the supply of new housing available to blacks.

Plaintiffs produced additional proof concerning the existence of dual housing markets through the testimony of another expert witness, Scott Tyler, a real estate broker and appraiser with many years of experience in the real estate business in Chicago. Significantly, defendants seemingly concede the existence of a dual housing market in Chicago. Nor do we think it beyond the strictures of judicial notice to observe that there exists in Chicago and its environs a high degree of racial residential segregation.[10]

We turn to the second element of the case, whether there was a sufficient *prima facie* showing of an unreasonable differential in price and sale terms between the housing sold or offered by defendants to plaintiffs and comparable housing available to whites. With respect to this phase plaintiffs offered the appraisal testimony of five expert witnesses; the testimony of two, however, was excluded from the jury by the trial judge. Concerning the testimony of Scott Tylor and John Hank which the judge did allow, both witnesses utilized the market data method of appraisal in arriving at a fair market value of a sampling of plaintiffs' homes. The fair market value appraisals were based on sales of comparable homes in all-white neighborhoods which were located in close geographical proximity to plaintiffs' homes and had similar communal amentities such as transportation, schools, churches, and quality of neighbor-

10. A recent study by the Council on Municipal Performance indicates that of the thirty largest cities in the United States Chicago is the second most segregated. *See* Vol. 1, No. 2 Municipal Performance Report, November 1973, at 16-18.

hood. Both witnesses testified that the comparable white housing was sold at prices substantially below the prices commanded by defendants. Expert witness Tyler's appraisals demonstrated that on the average the contract prices charged by defendants exceeded the fair market value of the homes by $6,508, or 34.5 percent. Expert witness Hank was of the opinion that on the average defendants' prices exceeded fair market value by $4,209, or 20.6 percent. Plaintiff adduced additional appraisal testimony from Paul Underwood who had been an appraiser for a savings and loan association which had loaned money to one of the defendant land companies for construction of houses sold to plaintiffs. Pursuant to this financing arrangement Underwood appraised thirty of defendants' houses for which he testified that the sales price charged by defendants, on the average, exceeded fair market value by $4,296, or 20.9 percent.[11] Based on the foregoing we think a jury could reasonably reach the conclusion that defendants' price differential was unreasonably in excess of fair market value and prices available to white citizens for comparable housing. Accordingly, there was sufficient evidence on the price differential to send the case to the jury.

Turning to the issue of the reasonableness of the sale terms differential the evidence at trial indicated that defendants refused to sell other than on land contract to plaintiffs.[12] There was

11. The trial court improperly excluded appraisal evidence of Walter Tomlinson and Francis Parker. *See, e.g., Illinois Power & Light Co.* v. *Talbot,* 321 Ill. 538, 543 (1926). Tomlinson and Parker were employed by savings and loan institutions and as a consequence thereof they had appraised certain of defendants' constructions, for the purpose of extending construction mortgage funds. Tomlinson was of the opinion that defendants' sales prices were, on the average, $4,099 or 20.4 percent in excess of appraised value while Parker's appraisals reflected an average excess of $3,729 or 16.6 percent over the fair cash market value of the respective houses.

12. A pre-printed form installment sales contract was used setting forth the total sales price, the deferred balance after down payment, the minimum monthly principal and interest payment, and the interest rate. None of the contracts specified the term over which payments were to be made. The average contract term was 28 years;

testimony to the effect that defendants refused to participate in any sales through a deed and mortgage arrangement despite the prospective buyer's ability to obtain mortgage financing. The evidence indicates that plaintiffs were of the equivalent economic status as many whites who routinely obtained mortgages to finance the purchase of houses and that a competing construction company in the black market sold the vast majority of its homes on deed and mortgage to blacks similarly situated economically to plaintiffs. Also, the evidence demonstrates that some plaintiffs made down payments of up to forty-five percent of the contract price—well above the amount needed to qualify for mortgages—and yet defendants refused to deal on terms other than contract.[13] On the basis of this evidence it could reasonably be inferred that defendants utilized the contract method of sales to facilitate their exhorbitant pricing practices[14] and not because of significant differences between

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some terms ranged upwards to 40 or more years. The contracts prohibited installation of improvements such as storm windows, fences, patios, and garages, unless prior permission was obtained from the land company. Title to the real estate was retained by the land company until the entire amount of the deferred balance was satisfied. Upon default and repossession the land companies were permitted to retain the entire amount which the contract purchaser had paid on the property and any improvements.

13. In a letter to a Chicago savings and loan association which advanced construction mortgage money an officer and owner of defendants boasted of the large down payments being made by the contract purchasers proclaiming them to be ". . . substantially above that current in the trade." Despite this and other indicia of financial stability exhibited by plaintiffs, the defendants insisted on the contract method of sales to the exclusion of mortgages.

It is also worthy of note that defendants offered no incentive to the contract purchaser to pay off the balance immediately. The notion that contract buyers must pay higher prices because the seller assumes the risk of nonpayment was admitted by defendants not to be applicable to plaintiffs; defendants' contract prices being the same as if the sales were cash. The sales prices under installment contracts were the same as they would have been if for cash or through mortgage financing.

14. Mr. Justin Hulman, a former Illinois Commissioner of Savings and Loan Associations, testified for plaintiffs with respect to the direct relationship between fair housing prices and mortgage avail-

plaintiffs' economic status and that of whites similarly situated who were able to utilize mortgage financing. Hence, a jury could find that the different treatment accorded plaintiffs by defendants' sales terms was discriminatory.

Furthermore, plaintiffs offered evidence, which was erroneously excluded by the trial judge, sufficient to establish a *prima facie* case pursuant to the traditional theory of discrimination. Under that theory there must be a showing of "treating, in similar circumstances, a member or members of one race different from the manner in which members of another race are treated." *Love* v. *DeCarlo Homes, Inc.*, 482 F.2d 613, 615 (5th Cir. 1973). That is, a black prospective buyer of a dwelling demonstrates discriminatory conduct if he proves that an owner utilizes different pricing policies with respect to blacks and whites similarly situated.

The proffered evidence which was rejected at trial involved the sales of new houses to white buyers in Deerfield, Illinois and Park Forest South, Illinois, both being suburban residential developments. The sellers of the houses in Deerfield were Universal Construction Company and a joint venture comprised of the Deerfield Home Development Company and Universal Builders, Inc., while the houses in Park Forest South were sold by the P.F.S. Development Company. The plaintiffs contended that these corporations were owned and managed by the same persons that owned and managed defendants and that these

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ability. Mr. Hulman indicated that it was the practice of lending institutions during 1959 to 1969 to make mortgages of up to 90 percent of the appraised value of the property, the difference being the down payment. As the sales price increases relative to the appraisal value of a home the disparity—as reflected in the amount of the down payment—becomes more apparent and the availability of mortgage money lessens. By forcing plaintiffs to purchase on contract the defendants kept plaintiffs ignorant of the appraised value of the properties and the great disparity between fair market value and the sales price. Sales on contract avoided intervention by mortgage lending institutions and the certain disclosure by the institutions of the disparity between sales price and appraised value. To that extent the contract method of sales facilitated defendants' exhorbitant pricing practices.

persons were engaged in discriminatory conduct through the use of different pricing practices in Deerfield and Park Forest South from those used in pricing defendants' houses. The trial judge excluded the evidence on two grounds: (1) the plaintiffs were not allowed to disregard the separate identities of the three corporations and (2) the lack of a basis of comparability for homes in Deerfield and Park Forest South with those of plaintiffs in Chicago. We rule that the trial court erred in excluding plaintiffs' evidence on the Deerfield and Park Forest South pricing policies.

Defendants' argument that the corporate formalities should not be disregarded in the context of the issues is without worth. As this court has stated, corporate formalities "may be disregarded in exceptional situations where it otherwise would present an obstacle to the due protection or enforcement of public or private rights." *Ohio Tank Car Co.* v. *Keith Ry. Equip. Co.*, 148 F.2d 4, 6 (7th Cir. 1945), *cert. denied*, 326 U.S. 730 (1945). In situations such as here, where common ownership and management exists, corporate formalities must not be rigidly adhered to when inquiry is made of civil rights violations. Accordingly, the objection raised by defendants presents no obstacles to the comparison of defendants' pricing policies in Chicago with the pricing policies implemented in Deerfield and Park Forest South by the other selling organizations.

Turning to the second reason given for excluding the Deerfield and Park Forest South evidence we find that there was sufficient comparability between those operations and defendants' sales in the relevant black market so as to render the exclusion an abuse of discretion. Factors such as geographical proximity, the date of the sale, type of construction, and materials used are factors going only to the weight to be accorded the evidence by the jury and do not go to its admissibility. *See, e.g., Winston* v. *United States*, 342 F.2d 715, 721 (9th Cir. 1965); *United States* v. *124.84 Acres of Land, Warrick County, Ind.*,

387 F.2d 912 (7th Cir. 1968). Plaintiffs met the requirement of sufficient comparability through the use of a comparative statistical analysis of accounting data reflecting defendants' sales operations and pricing policies in Chicago with those of Deerfield and Park Forest South. We find plaintiffs' statistical evidence to have been sufficiently competent; *see United States* v. *Certain Interests in Property, Etc.*, 326 F.2d 109 (2d Cir. 1964), *cert. denied*, 377 U.S. 978 (1964), and probative of plaintiffs' claim that defendants sold houses to blacks on price terms different from those they sold to white buyers similarly situated. Indeed, as the Eighth Circuit has stated, "statistical evidence can make a prima facie case of discrimination." *Carter* v. *Gallagher*, 452 F.2d 315, 323 (8th Cir. 1972), *cert. denied*, 406 U.S. 950 (1972).[15]

Plaintiffs' expert witnesses testified that in the housing industry prices are established on the basis of direct costs, consisting generally of the investment in the land and the cost of construction, including materials. Once the direct costs are calculated, an allowance for overhead and profit is added to the direct costs to attain the sales price. The allowance for overhead and profit is the gross profit on sales which plaintiffs' expert witness testimony indicated was generally found in the real estate industry to be from fifteen to nineteen percent of the sales price.[16]

15. Defendants' claim that the statistical evidence comparing the suburban and Chicago operations should properly be excluded as it was not within the contemplation of plaintiffs' pleadings. We find such an assertion to be without merit. *See Conley* v. *Gibson*, 355 U.S. 41, 47-48 (1957). It would appear that through discovery and other pre-trial procedures defendants were clearly apprised of plaintiffs' theory of the case and the evidence pertaining to it.

16. To the extent that differences in land location and building materials affect sales price, those differences are reflected in the absolute amount of direct costs. The differences do not affect the pricing methods employed. That is, the expert testimony and defendants were agreed that the type of house or area in which it is built does not affect the method of setting prices. The selling price is arrived at by establishing direct costs and adding an amount for overhead and profit. The amount added for overhead and profit represents the gross profit and is an important comparative figure in analyzing the substance of the pricing methods employed by defendants.

Defendants testified to the utilization of this method of pricing in their sales to plaintiffs; however, the statistical evidence presented by plaintiffs tends to refute that assertion.[17]

Viewing the evidence, first in absolute terms, it shows that defendants' pricing policy in Chicago produced an average gross profit substantially in excess of that produced by the Deerfield and Park Forest South operations.[18] In relative percentage terms defendants reaped a gross profit of 27.6 percent of sales, well above the industry figure of 14 to 19 percent and considerably in excess of the gross profit percentages of the Deerfield and Park Forest South operations.[19] Second, analyzing the same data in

17. Plaintiffs' statistical evidence was prepared by John Royer, an independent certified public accountant. To assure a substantial basis for statistical comparability between the Chicago and suburban operations, Royer made appropriate adjustments for differences in accounting methods and financial presentations between the various operations. Moreover, with respect to percentage comparisons of gross profit and mark-up, Royer testified that before calculating such percentages he determined that the components of direct costs were the same for the suburban companies as for the defendant companies.

18. In those instances where direct costs were comparable in absolute amounts, the gross profit garnered by defendants was substantially in excess of that obtained in the suburban operations. For example, the following chart compares the operations of Universal Construction Co. in Deerfield with defendants' efforts in Chicago:

	(1) Universal Construction Company	(2) Chicago Operation	(3) Difference (Column 2 Minus 1)
Average Sales Price	$22,644.60	$25,172.53	$ 2,527.93
Average Direct Costs (Land Plus Building)	$18,779.45	$18,246.14	$ —553.31
Average Gross Profit	$ 3,865.15	$ 6,926.39	$ 3,061.24

Although the average direct costs were slightly lower in the Chicago operations, the average sales price and average gross profit were substantially higher in those operations than in the Deerfield operations.

19. In Deerfield, Universal Construction realized a gross profit of 17.1 percent while the gross profit of the Deerfield Home-Universal Builders joint venture was 17.6 percent. The operations in Park Forest South turned an average gross profit of 15.5 percent of sales price.

terms of the mark-up of the sales price over the direct costs, it is clear that the mark-up—as a percentage of direct costs—was much higher in the sales to plaintiffs than in the sales to white buyers in Deerfield and Park Forest South.[20]

The statistical evidence substantiates the claim that defendants priced plaintiffs' houses much higher relative to direct costs than the houses sold in Deerfield and Park Forest South and belies any contention that defendants utilized comparable pricing policies in their sales to plaintiffs. Plaintiffs presented Dr. Richard Freeman, a Professor of Economics, who analyzed the statistical data pertaining to the difference in gross profits between defendants' sales to plaintiffs and the suburban operations. His analysis demonstrated that the difference in pricing practices was due to the race of the buyer and not economic factors.[21]

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20. The average mark-up or ratio of gross profit to direct costs was 20.58 percent for Universal Construction while the Deerfield Home joint venture operations reflected a mark-up of 21.42 percent; the markup in Park Forest South was 18.35 percent. In contrast, defendants' mark-up on their sales to plaintiffs averaged 37.96 percent.

21. Dr. Freeman teaches econometrics—the analysis of statistical materials in economics—and specializes in the subject of the economics of discrimination against blacks. Dr. Freeman analyzed the evidence elicited by plaintiffs and rendered an interpretative opinion thereof. The trial judge excluded Dr. Freeman's testimony on the ground that it invaded the province of the jury because "discrimination is not a technical matter." It can hardly be gainsaid that interpretation and analysis of this elaborate statistical evidence is something more than a nontechnical matter, or that the discrimination alleged surpasses the niche of simplicity. Nor do we perceive an inability on the part of the jury to appropriately appraise Dr. Freeman's testimony and attribute to it whatever worth and weight of which it is deserving. Keeping in mind our recent enunciation that there is a 'presumption that informed opinion will be admitted," *United States* v. *Dellinger,* 472 F.2d 340, 383 (7th Cir. 1972), we hold that the trial judge erred in prohibiting Dr. Freeman to testify before the jury. *United States* v. *Johnson,* 319 U.S. 503, 519 (1943).

The sum of Dr. Freeman's testimony, as indicated, was that the differences in gross profits—that is, the difference in defendants' performance in the white and black housing markets—was due to racial factors. In addition, Dr. Freeman testified as to the import of plaintiffs' economic data pertaining to their exploitation theory of

In summary, it is difficult as a *prima facie* matter to infer that the substantial disparity between the pricing practices of defendants in the black real estate market and the pricing practices in the white market was attributable to some factor other than the race of the buyers. Whether defendants afforded plaintiffs the "same right" to purchase housing as offered white buyers was, based on the foregoing evidence, an issue to be properly submitted to the jury.

III.

Plaintiffs also raise numerous procedural issues arising out of the course of this protracted litigation. They claim that the district court erred in: (1) denying plaintiffs' motion to amend their complaint by adding additional defendants; (2) requiring class members affirmatively to request inclusion as plaintiffs; (3) dismissing with prejudice class members who failed to answer interrogatories or to appear for depositions; (4) the method of disposing of the second count of defendants' amended counterclaim; and (5) erred in the assessment of costs against plaintiffs.

One month prior to when the trial was scheduled to begin and four months before its actual commencement the plaintiffs moved under Fed. R. Civ. P. 15(a) to amend their complaint adding as parties defendant certain persons who were the principal officers, directors, and shareholders of the defendants.[22] The district court denied plaintiffs' motion on the ground that it was not timely. We are not convinced that plaintiffs' motion would have delayed the trial. Moreover, absent a showing of

liability. On the basis of his analysis, Dr. Freeman was of the opinion that the difference between defendants' sales prices and the fair market value of the houses and prices charged white citizens for comparable housing was due in large part to race.

22. Rule 15(a) provides that after the answer is filed the plaintiff may amend his complaint ". . . only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires."

prejudice, a mere delay in the commencement of the action should not ordinarily operate to preclude a motion to amend the complaint. *See Middle Atlantic Utilities Co.* v. *S.M.W. Development Co.*, 392 F.2d 380, 384 (2d Cir. 1968). Plaintiffs' requested amendment would not have prejudiced the defendant corporations nor the persons sought to be added to the action as defendants. Those persons, as officers, directors, and shareholders of the closely held defendant corporations were on constructive notice of the action and indeed were active participants in it since its inception. Under these circumstances it was error to not grant plaintiffs leave to amend. *See Gifford* v. *Wichita Falls and Southern Ry. Co.*, 224 F.2d 374, 376 (5th Cir. 1955), *cert. denied*, 350 U.S. 895 (1955).[23]

Plaintiffs next contend that it was error for the trial judge to require members of the plaintiff class to request inclusion in the class. Pursuant to Fed. R. Civ. 23, Judge Will ordered that all class members be notified that they would be included in the class unless they expressly requested exclusion. When the case came before Judge Perry a second notice was ordered to be sent to the plaintiffs advising them that unless they affirmatively requested inclusion in the class they would be excluded. It can-

23. The defendants' claim that the addition as defendants of the officers and shareholders of the defendant corporations would be an improper failure to adhere to the corporate formalities and separate identitfy. In our prior statement rejecting this contention we referred to our decision in *Ohio Tank Car Co.* v. *Keith Ry. Equipment Co.*, 148 F.2d 4, 6 (7th Cir.), *cert. denied*, 326 U.S. 730 (1945), where we held:

> The general rule that a corporation and its stockholders are deemed separate entities is subject to the qualification that the separate identity may be disregarded in exceptional situations where it otherwise would present an obstacle to the due protection or enforcement of public or private rights.

The concept of separate identity between shareholders and their corporations is not sacrosanct. It demands even lesser respect when it becomes clear that the corporation is used as a vehicle to violate the civil rights of others. The instant action is an "exceptional situation" sufficient to justify disregard of the corporate identities, as we have already ruled.

not be doubted that the sending of this second and conflicting notice was confusing to a class member and was an unsound practice. Moreover, the requirement of an affirmative request for inclusion in the class is contrary to the express language of Rule 23(c)(2)(B) that "the notice shall advise each member that . . . the judgment, whether favorable or not, will include all members who do not request exclusion." In light of the confusion created by the conflicting notices and the clear language of Rule 23(c)(2)(B), the trial court erred in ordering the second notice requiring an affirmative response for inclusion. *See Korn* v. *Franchard Corp.*, 456 F.2d 1206, 1210 (2d Cir. 1972). Accordingly, all members who did not request exclusion are proper parties to the judgment in this action.

Addressing ourselves to the issue of propriety of dismissing with prejudice class members who failed to answer interrogatories or appear for depositions, we think the district judge erred. In *Brennan* v. *Midwestern United Life Ins. Co.*, 450 F.2d 999 (7th Cir. 1971), *cert. denied*, 405 U.S. 921 (1972), we held that in appropriate circumstances absent class members may be propounded written interrogatories on a showing that the information requested is necessary to trial preparation and that the interrogatory is not designed "as a tactic to take undue advantage of the class members or as a stratagem to reduce the number of claimants." 450 F.2d at 1005. The party seeking discovery has the burden of demonstrating its merits.

With respect to the written interrogatories propounded in the case at bar we fail to discern any attempt by the trial court in reaching a determination as to whether the information sought was necessary, or whether the interrogatories were a mere strategem to diminish class membership. There was no showing on the merits of defendants' request. More important, in view of the substantive nature of the questions propounded we do not believe that defendants could have met the burden of demonstrating the meritorious nature of their request.[24]

24. The interrogatories sought answers to questions that would have required the assistance of technical and legal advice in under-

The taking of depositions of absent class members is—as is true of written interrogatories—appropriate in special circumstances. And, not unlike the use of interrogatories, the party seeking the depositions has the burden of showing necessity and absence of any motive to take undue advantage of the class members. However, in light of the nature of the deposition process—namely, the passive litigants are reqired to appear for questioning and are subject to often stiff interrogation by opposing counsel with the concomitant need for counsel of their own —we are of the view that the burden confronting the party seeking deposition testimony should be more severe than that imposed on the party requesting permission to use interogatories. The record in this action is devoid of any showing that defendants met that burden.

The plaintiffs contend that the district court erred in its disposition of the second count of defendants' counterclaim. At the time the directed verdict for defendants was granted the district court, with defendants' consent, ordered dismissal of defendants' counterclaim subject to automatic reinstatement in the event plaintiffs appealed from the district court's grant of directed verdict for defendants. Plaintiffs urge this conditional dismissal was improper and that the counterclaim should be dismissed with prejudice and without qualification.

We agree with plaintiffs that dismissal subject to reinstatement if plaintiffs appealed was a highly improper attempt at coercing plaintiffs into waiving their right to appeal and as such was error. See, *e.g.*, *Worcester* v. *C.I.R.*, 370 F.2d 713, 718 (1st Cir. 1966); *North Carolina* v. *Pearce*, 395 U.S. 711, 724 (1969). In addition, the record indicates that, contrary to defendants' assertion, plaintiffs' objection to this conditional dismissal was timely.

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standing the questions and formulating responsive answers thereto. Indeed, certain of the questions pertained to allegations that were proved at trial through the use of expert witnesses. In addition, some of the interrogatories sought information on matters already known to defendants.

Defendants' counterclaim does not arise "out of the transaction or occurrence that is the subject matter of the opposing party's claim. . . ." Fed. R. Civ. P. 13(a). The counterclaim invokes matters unrelated to plaintiffs' civil rights claims, involving alleged tortious acts by certain of the plaintiffs which acts are claimed to have begun in 1968, post-dating the violations of plaintiffs' civil rights by as much as ten years. Therefore the counterclaim was permissive under Fed. R. Civ. P. 13(b), rather than compulsory and as such must be supported by federal subject matter jurisdiction independent of the jurisdiction supporting plaintiffs' complaint. *Diamond* v. *Terminal Railway Alabama State Docks,* 421 F. 2d 228, 235-36 (5th Cir. 1970). There is here no discernible independent federal jurisdiction over defendants' proffered counterclaim; accordingly it should have been dismissed with prejudice.

Lastly, plaintiffs take issue with the trial judge's statement on assessment of costs:

> I am taking the matter of apportioning costs under advisement. If there is no appeal, I expect to order each of the parties to bear their own respective costs. If there is an appeal, I will enter the order as I see fit, in accordance with the law.

In response to an inquiry by plaintiffs' counsel, the trial judge commented that, "there would be no costs assessed against those who do not appeal."

Although the district court has discretionary power to assess costs, the action it took was improper and clearly an abuse of discretion. As we previously indicated, any attempt by a court at preventing an appeal is unwarranted and cannot be tolerated. The separate order of the district court on costs is reversed and, pursuant to Fed. R. Civ. P. 54(d), each side is directed to bear its own costs.

We reverse the judgment of the district court and remand for a new trial under Circuit Rule 23.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B.

CHARLES BAKER, ET AL.,
Plaintiffs-Appellees,
vs.
F & F INVESTMENT, ET AL.,
Defendants-Appellants.

SIDNEY CLARK, ET AL.,
Plaintiffs-Appellees,
vs.
UNIVERSAL BUILDERS, INC., ET AL.,
Defendants-Appellants.

Nos. 17815, 17816, 17750, 17751.

UNITED STATES COURT OF APPEALS,
Seventh Circuit.

Jan. 6, 1970.

REHEARING DENIED AND REHEARING EN BANC DENIED MARCH 5, 1970.

Before DUFFY, *Senior Circuit Judge* and KILEY and CUMMINGS, *Circuit Judges.*

CUMMINGS, *Circuit Judge.*

These consolidated appeals concern statute of limitations rulings of the district court with respect to two related class actions brought by Negro purchasers of new and used residential real estate in Chicago. The purchases were on installment contracts allegedly containing terms less favorable to Negroes than would have been available to whites. Count I of each com-

plaint was based principally on Section 1982 of the Civil Rights Act of 1866 (42 U.S.C. § 1982), as construed in Jones v. Alfred H. Mayer Co., 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed. 2d 1189. Count II of the *Baker* complaint alleged violations of the federal antitrust laws, and Count III of the *Baker* complaint alleged violations of the Illinois antitrust laws.[1]

The district court held that the Illinois 5-year statute of limitations governing civil actions not otherwise provided for (Ill. Rev.Stat. (1967) ch. 83, § 16) is applicable to Count I of both complaints and that the 4-year statutes of limitations contained in the federal and Illinois antitrust laws (15 U.S.C. § 15b and Ill.Rev.Stat. (1967) ch. 38, § 60-7) are respectively applicable to *Baker* Counts II and III. However, the court held that the statutes of limitations run from the date the real estate installment contracts terminate rather than from the date they were executed, as defendants had contended. Accordingly, the court concluded that the plaintiff classes must be redefined to eliminate the purchasers whose contracts terminated prior to the periods of limitations.[2] Defendants have brought interlocutory appeals from the district court's decision and plaintiffs were given leave to cross appeal. These interlocutory and cross appeals require us to decide whether the doctrine of laches is applicable. If not, we must determine what statutes of limitations, if any, are applicable to Counts I of each complaint and to *Baker* Counts II and III, and when they began to run.

The Doctrine of Laches Is Inapplicable.

As to Count I based on the Civil Rights Act, plaintiffs and the United States as *amicus curiae* urge that the claims are

1. Since the court below held that plaintiff stated a claim for relief under Section 1982, it did not pass upon the motions to dismiss as to violations of Sections 1981, 1983 and 1985(3) of the Civil Rights Act and of the Thirteenth and Fourteenth Amendments to the Constitution of the United States, nor do we. Motions to dismiss were sustained as to other Counts of both complaints. Those Counts are not involved in this appeal.

2. The opinion of the district court is reported at 300 F.Supp. 210.

governed by laches rather than by the statutes of limitations. They would be correct if the claims were solely equitable. Russell v. Todd, 309 U.S. 280, 60 S.Ct. 527, 84 L.Ed. 754; Holmberg v. Armbrecht, 327 U.S. 392, 66 S.Ct. 582, 90 L.Ed. 743. However, the complaints seek money damages, both actual and punitive, and cannot be deemed exclusively equitable. Therefore, as we recently held in Morgan v. Koch, 419 F.2d 993 (7th Cir., 1969), the doctrine of laches does not apply to the Count I claims.[3]

State Statutes of Limitations Apply to Federal Civil Rights Actions.

Despite long settled rulings to the contrary, plaintiffs assert that no state statute of limitations bars federal civil rights actions. Ever since the 1915 decision of the Supreme Court in O'Sullivan v. Felix, 233 U.S. 318, 34 S.Ct. 596, 58 L.Ed. 980, the courts have uniformly held that state limitations statutes are to be applied to federal civil rights actions other than those based upon Section 1986 of the 1871 Act (42 U.S.C. § 1986). See, *e.g.*, Francis v. Crafts, 203 F.2d 809 (1st Cir. 1953), certiorari denied, 346 U.S. 835, 74 S.Ct. 43, 98 L.Ed. 357; Swan v. Board of Higher Education of City of New York, 319 F.2d 56, 59 (2d Cir. 1963); Hileman v. Knable, 391 F.2d 596, 597 (3d Cir. 1968); Beard v. Stephens, 372 F.2d 685, 688 (5th Cir. 1967); Crawford v. Zeitler, 326 F.2d 119, 121 (6th Cir. 1964); Smith v. Cremins, 308 F.2d 187, 189, 98 A.L.R.2d 1154 (9th Cir. 1962). Our decision in Wakat v. Harlib, 253 F.2d 59 (7th Cir. 1958), is to the same effect and requires our rejection of plaintiffs' argument that no statute of limitations bars Count I of these complaints.

3. It is unnecessary to consider the Illinois laches cases cited by plaintiffs. The applicability of the doctrine of laches to actions in federal courts based on federally created causes of action is a matter of federal and not state law. We need not decide the extent to which federal courts should follow state decisions where the doctrine is applicable.

Plaintiffs, however, argue that these decisions rest upon a faulty application of the Rules of Decision Act (28 U.S.C. § 1652).[4] They contend that the original purpose of that statute was to reassure opponents of diversity jurisdiction that state law would be applied by federal courts in diversity cases. They argue that any limitation on federally based actions is properly a matter of federal law and that the exception in the Rules of Decision Act covers this case. They urge that civil rights actions demand uniform federal rules in all particulars and that the failure of Congress to enact a statute of limitations applicable to Section 1982 of the Civil Rights Act evidences an intent that no statutory limitation should bar relief. We are unable to accept this position.

Regardless of the intended effect which the Rules of Decision Act was to have upon diversity jurisdiction, it was soon firmly applied to those gaps in federal law for which no uniform, common law was felt by the courts to be necessary. More than 30 years before the enactment of the Civil Rights Act, the Supreme Court held in McCluny v. Silliman, 28 U.S. (3 Pet.) 270, 7 L.Ed. 676, that under the Rules of Decision Act the federal courts must apply state statutes of limitations to federal causes of action in the absence of a special provision by Congress:

> "Under this statute [the Rules of Decision Act] the acts of limitations of the several states, where no special provision has been made by Congress, form a rule of decision in the courts of the United States, and the same effect is given to them as is given in the state courts." 28 U.S. (3 Pet.) at p. 277, 7 L.Ed. 676.[5]

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4. The statute provides:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in courts of the United States, in cases where they apply."

5. Despite plaintiffs' characterization, Metropolitan R. Co. v. District of Columbia, 132 U.S. 1, 13, 10 S.Ct. 19, 33 L.Ed. 231, does not suggest that *McCluny* involved no federal question at all but was only an action under an implied contract. McCluny had asserted that

This rule has never been seriously challenged. Moreover, since Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, overruled the doctrine of Swift v. Tyson, 41 U.S. (16 Pet.) 1, 10 L.Ed. 865, adoption of state statutes to fill gaps in federal law has continued as a prime function of the Rules of Decision Act.

Nor does that Act's exception to state rules which conflict with federal law apply to statutes of limitations. Limitations on the period within which a right may be redressed do not conflict with the existence of that right. Cf. the Virginia Coupon Cases, 114 U.S. 269, 303, 5 S.Ct. 903, 29 L.Ed. 185. Rather, absent a direct expression by Congress to the contrary, limitations on actions are deemed so universal that the courts must supply an appropriate period by absorbing an applicable state statute into the interstices of federal law. As the Court stated in Campbell v. City of Haverhill, 155 U.S. 610, 616-617, 15 S.Ct. 217, 219-220, 39 L.Ed. 280:

> "Unless this be the law, we have the anomaly of a distinct class of actions subject to no limitation whatever; a class of privileged plaintiffs who, in this particular, are outside the pale of the law, and subject to no limitation of time in which they may institute their actions. The result is that users of patented articles, perhaps innocent of any wrong intention, may be fretted by actions brought against them after all their witnesses are dead, and perhaps after all memory of the transaction is lost to them. This cannot have been within the contemplation of the legislative power. As was said by Chief Justice Marshall in Adams v. Woods, 2 Cranch, 336, 342, [2 L.Ed. 297] of a similar statute: 'This would be utterly repugnant to the genius of our laws.'"

In addition to the application of a state statute of limitations to the Civil Rights Act of 1870 in O'Sullivan v. Felix, 233

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his "rights accrued to him under a law of congress." 28 U.S. (3 Pet.) at p. 276, 7 L.Ed. 676. This is also reaffirmed in the discussion of the *McCluny* case in Campbell v. City of Haverhill, 155 U.S. 610, 619-620, 15 S.Ct. 217, 39 L.Ed. 280.

U.S. 318, 34 S.Ct. 596, 58 L.Ed. 980, state statutes of limitations have been held to prescribe limitations standards for such diverse and important federal Acts as the Sherman Antitrust Act (Chattanooga Foundry v. Atlanta, 203 U.S. 390, 27 S.Ct. 65, 51 L.Ed. 241), and the Labor Management Relations Act of 1947 (International Union, United Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 86 S.Ct. 1107, 16 L.Ed.2d 192.) Plaintiffs have furnished no convincing distinction between the use of state limitations statutes for those statutes and their application to actions under the various Civil Rights Acts. No evidence from the legislative history or the nature of the Civil Rights Acts points to such a distinction. Federal legislation is often directed to the cure or prevention of a substantial evil. The fact that the Civil Rights Acts grew out of the need to remedy prior abuses of state law and state officials fails to indicate that Congress intended private actions to remain ripe interminably or that the federal courts could not be trusted to select appropriate state limitations statutes.

Plaintiffs point out that Congress enacted a one-year limitation for actions based upon the "passive accessory" provision of Section 6 of the 1871 Civil Rights Act (42 U.S.C. § 1986). They argue that the failure of Congress to enact a specific limitation applicable to any other provision of the Civil Rights Acts of 1866, 1870 or 1871, indicates an intent that no statutory limitation should apply. We disagree. A fairer interpretation of the import of Congress' 1871 action would be the desire to insure that actions against "passive accessories" must be brought in a relatively short time after any injury has been suffered. Congress has never demonstrated any wish for unlimited actions or (apart from Section 1986) uniform standards of limitation in this area of the law.

Similarly, we refuse to read into Section 3 of the 1866 Civil Rights Act, now 42 U.S.C. § 1988, any antipathy to the adoption of appropriate state statutes of limitations in civil rights

actions.[6] Plaintiffs contend that Section 1988 limits the use of state common or statutory law in civil rights actions to those local rules which assist or extend the plaintiffs in vindicating their rights. As such, they argue, it bars the adoption of state laws of limitation of actions which cut off otherwise meritorious claims because of a lapse of time. We are reluctant to construe Section 1988 so broadly in the face of the well settled practice of adopting state limitations periods for federal law. Congress would surely have spoken more explicitly had it intended that civil rights actions should endure forever or be subject only to laches, regardless of the nature of the claim presented.

No conflict appears between Section 1988 and the application of state limitations acts in civil rights cases. That Section provides for the use of state law as a supplement to the remedial powers of federal district courts. Cf. Sullivan v. Little Hunting Park, 396 U.S. 229, 90 S.Ct. 400, 24 L.Ed.2d 386. It is addressed to those cases in which existing federal practice falls short of accomplishing the purposes of the Civil Rights Acts because the courts otherwise lack the power to bring about the appropriate results. This function does not vary the application of appropriate substantive state laws ordinarily adopted by federal courts to fill gaps in federal substantive law. We find no indication that Congress intended Section 1988 to perpetuate

6. Section 3 of the 1866 Civil Rights Act provides in pertinent part:

> "The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause. * * *"

such hiatuses because, in particular instances, plaintiffs' claims might be barred for failure to comply with state law. In truth, Section 1988 was designed to supplement but not supplant the Rules of Decision Act. Cf. In re Stupp, 23 Fed.Case No. 13,563, p. 296 at 299, 12 Blatchf. 501 (Cir.Ct., S.D.N.Y. 1875); Schatte v. International Alliance, 70 F.Supp. 1008, 1010 (S.D.Calif. 1947), affirmed, 165 F.2d 216 (9th Cir. 1948), certiorari denied, 334 U.S. 812, 68 S.Ct. 1018, 92 L.Ed. 1743.

Section 1988 is inapplicable where substantive law denies a plaintiff any right to relief. All rules which affect the right of recovery necessarily affect its "remedy." That does not mean, however, that all such rules must necessarily be considered "remedial" within the purview of Section 1988. We reject the position, apparently urged by plaintiffs, that the bar imposed by a statute of limitations is remedial because, like survivorship, it affects the ultimate right to any recovery at all. Cf. Brazier v. Cherry, 293 F.2d 401 (5th Cir. 1961), certiorari denied, 368 U.S. 921, 82 S.Ct. 243, 7 L.Ed.2d 136; Pritchard v. Smith, 289 F.2d 153, 157, 88 A.L.R.2d 1146 (8th Cir. 1961).[7] Since Section 1988 was not employed here to adopt any state remedial rules it has no relevance to the instant case.[8]

7. To the extent that these two rules are not properly distinguishable, we believe that Section 1988 was unnecessarily and inaptly relied upon as the justification for the adoption of state survival law in federally based actions. As the opinion in Pritchard v. Smith conclusively indicates, other areas of federal law quite readily adopted state survival rules for application to federal statutes which contained no provision resembling Section 1988 (including the Jones Act, the Merchant Marine Act, the F.E.L.A. and even the Sherman Act). The result of *Brazier* and *Pritchard* has firm basis in federal law and policy quite apart from any reference to Section 1988. While many of the comments contained in those cases concerning the nature of Section 1988 are well considered, the decisions do not necessarily depend upon that statute.

8. Compare Hughes v. Smith, 264 F.Supp. 767, 769 (D.N.J. 1967), where Section 1988 was itself employed as the basis for the application of the state's statute of limitations to bar an action brought under 42 U.S.C. § 1983. The point was conceded on appeal and the decision was affirmed by the Third Circuit, 389 F.2d 42 (1968).

Our conclusion finds further support in the long vitality of the Supreme Court's decision in O'Sullivan v. Felix, 233 U.S. 318, 34 S.Ct. 596, 58 L.Ed. 980, which was again recently cited with approval in International Union, United Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 704, 86 S.Ct. 1107, 16 L.Ed.2d 192. Legislative inaction is, to be sure, a poor token of Congressional intent. Nevertheless, in this area of the law, as stated in *Hoosier Cardinal Corp.*,

> * * * when Congres has disagreed with such an interpretation of its silence, it has spoken to overturn it by enacting a uniform period of limitations." 383 U.S. at p. 704, 86 S.Ct. at p. 1112.

We therefore hold that the application of state statutes of limitations to federal causes of action under the Civil Rights Acts is consistent with Congress' intent as expressed in the relevant statutes and violates neither the due process nor equal protection clauses. We adhere to our decision in Wakat v. Harlib, 253 F.2d 59 (7th Cir. 1958), and turn to the law of Illinois to determine the appropriate statute of limitations as to Count I of the instant cases.

The Applicable State Statute of Limitations Is Section 15 of the Illinois Limitations Act.

Turning to the various Illinois statutes of limitations, plaintiffs contend that the trial court erred in selecting Section 15 of the Illinois Limitations Act (Ill.Rev.Stat. (1967) ch. 83, § 16). They argue that the applicable provision should be either Section 12.1, dealing with actions regarding real estate, or Section 16, governing actions on written contracts (Ill.Rev. Stat. (1967) ch. 83, §§ 12.1 and 17).[9]

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9. The statutory sections read:

> 16. Oral contracts—Arbitration awards—Damage to property—Possessory actions—Civil actions. § 15. Except as provided in Section 2-725 of the "Uniform Commercial Code", enacted by the Seventy-second General Assembly, actions on unwritten contracts, expressed or implied, or on awards of arbi-

In Wakat v. Harlib, 253 F.2d 59 (7th Cir. 1958), this Court held that Section 15 was the applicable state statute of limitations for actions based upon 42 U.S.C. §§ 1983 and 1985:

> "A statutory right of action is a 'civil action not otherwise provided for' within the meaning of § 15 of the limitation act and is governed by the five-year statute." 253 F.2d at p. 63.

Although the present action is based upon Section 1982 of the Civil Rights Act rather than Sections 1983 and 1985, it too is a cause of action created by statute. As such, we must agree

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tration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued.

12.1 § 1. 40 year limitation on claims to real estate. No action based upon any claim arising or existing more than 40 years before the commencement of such action shall be maintained, either at law or in equity, in any court to recover any real estate in this state or to recover or establish any interest therein or claim thereto, legal or equitable, against the holder of the record title to such real estate when such holder of the record title and his grantors immediate or remote are shown by the record to have held chain of title to said real estate for at least 40 years before the action is commenced, unless such claimant, by himself or by his attorney or agent, or if he be a minor or under legal disability, by his guardian, conservator, trustee, either parent, or any other person acting in his behalf shall within 40 years after the claim upon which such action is based arises, file in the office of the recorder of deeds of the county wherein such real estate is situated, a verified statement definitely describing the real estate involved, the nature and extent of the right or interest claimed, and stating the facts upon which the same is based; Provided, however, that the holder of the record title to such real estate shall not be entitled to the protection of this Act if the real estate is in the adverse possession of another.

For purposes of this section an unborn or unascertained person may be a claimant and a verified statement may be filed on his behalf as hereinbefore provided.

For the purposes of this Act, any person who holds title to real estate by will or descent from any person who held the title of record to such real estate at the date of his death or who

with defendants and the district court that the rationale of our decision in *Wakat* governs and compels the application of Section 15 of the Illinois Limitations Act to Count I of each of the present actions.[10]

The Limitations Rulings Are Not Premature.

Where a complaint reveals that some claims are barred from recovery by limitations, they may be disposed of on a motion to dismiss. Kincheloe v. Farmer, 214 F.2d 604, 605, 75 S.Ct. 306, 99 L.Ed. 721 (7th Cir. 1954), certiorari denied, 348 U.S. 920; Anderson v. Linton, 178 F.2d 304, 309-310 (7th Cir. 1949). In many instances insufficient facts are contained in the complaint to afford an adequate basis for determining this issue. In the present case, however, despite allegations of conspiracy and concealment contained in the complaints, the court below concluded in each case:

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holds title by decree or order of any court, or by deed issued pursuant thereto, i.e., by trustee's, trustee's in bankruptcy, conservator's, guardian's, executor's, administrator's, receiver's, assignee's, master's in chancery, or sheriff's deed shall be deemed to hold chain of title the same as though holding by direct conveyance.

17. Writings—New contract. § 16. Except as provided in Section 2-725 of the "Uniform Commercial Code", enacted by the Seventy-second General Assembly, actions on bonds, promissory notes, bills of exchange, written leases, written contracts, or other evidences of indebtedness in writing, shall be commenced within 10 years next after the cause of action accrued; but if any payment or new promise to pay shall have been made, in writing, on any bond, note, bill, lease, contract, or other written evidence of indebtedness, within or after the period of 10 years, then an action may be commenced thereon at any time within 10 years after the time of such payment or promise to pay.

10. Plaintiffs apparently do not contest the holding below that *Baker* Count II, based upon the federal antitrust laws, is governed by the federal four-year antitrust statute of limitations. 15 U.S.C. § 15b. Likewise, no objection has been raised to the application of the four-year statute of limitations provided by state law to Count III of the complaints based upon the Illinois state antitrust statute. Ill.Rev.Stat. (1967) ch. 38, § 60-7.

> "The instant complaint, it should be noted, does present sufficient background for immediate determination of the limitations question. Moreover, considering the scope of the present litigation and the consequent magnitude of the discovery to be undertaken, it is particularly desirable that there be expeditious definition of the exact limits of the litigation in order to avoid unnecessary complexity and expense." 300 F.Supp. at pp. 218-219.

Plaintiffs argue that this ruling was improper in light of the allegations of their complaints. They contend that the alleged conspiracies preclude the passage of the limitations statute for all members of the classes until the last overt conspiratorial act has been disclosed. They also argue that the complaints contain allegations that the defendants concealed fact underlying the cause of action, thus tolling the statute. We feel, however, that the scope of further litigation should be delineated and confined within definite time limitations at this initial stage. This will facilitate disposition of the basic elements of the controversy and still allow for individual variations, exceptions and expansions as justice requires. We agree with the district court that at present insufficient basis has been presented for tolling the statute of limitations.

Bald allegations of conspiracy and concealment do not warrant delay in disposing of the question of the applicability of the statute of limitations. The statute of limitations does not toll automatically. Morgan v. Koch, 419 F.2d 993 (7th Cir. 1969). The allegation of a conspiracy alone is not an adequate basis from which fraudulent concealment may be inferred. Laundry Equipment Sales Corp. v. Borg-Warner Corp., 334 F.2d 788, 792 (7th Cir. 1964). Where courts have tolled limitations periods because of the existence of a conspiracy, the basis for the action has been the inherently secret nature of the conspiracy involved and its necessity as an element in the cause of action. Cf. Allis-Chalmers Mfg. v. Commonwealth Edison Co., 315 F.2d 558, 562 (7th Cir. 1963).

In order to obtain the shelter of the federal doctrine of fraudulent concealment, plaintiffs must be prepared to adduce sufficient evidence to warrant the conclusion that defendants concealed the basic facts disclosing the existence of a cause of action and that plaintiffs remained in ignorance of those facts through no fault of their own. Bailey v. Glover, 88 U.S. 342, 349, 21 Wall. 342, 349, 22 L.Ed. 636. Where, as in the case of many conspiracies in violation of federal antitrust laws, the wrong is self-concealing, little need be added in order to justify tolling the statute. In the present case, however, we are persuaded that the language of Judge Friendly in Moviecolor Limited v. Eastman Kodak Company, 288 F.2d 80, 87-88, 90 A.L.R.2d 252 (2d Cir. 1961), is fundamentally applicable:

> "Although the complaint liberally uses the adverb 'fraudulently' as to defendants' conduct, such allegations are not enough to make out a case of concealment. The complaint is inconsistent with any view either that plaintiff did not know of its injury in signing away its rights to the Keller-Dorian process, see Developments in the Law—Statutes of Limitations, 1950, 63 Harv.L.Rev. 1177, 1221, or that it did not know of the actions of the defendants and of French and American Keller-Dorian that led up to that. The case is thus quite unlike those in which a defendant has concealed the transaction sued upon, Bailey v. Glover, supra; Rosenthal v. Walker, 1884, 111 U.S. 185, 4 S.Ct. 382, 28 L.Ed. 395, or the facts rendering a known transaction actionable, Traer v. Clews, 1885, 115 U.S. 528 6 S.Ct. 155, 29 L.Ed. 467; Exploration Co. v. United States, 1918, 247 U.S. 435, 38 S.Ct. 571, 62 L.Ed. 1200; United States v. Diamond Coal & Coke Co., 1921, 255 U.S. 323, 41 S.Ct. 335, 65 L.Ed. 660, or his own identity, Holmberg v. Armbrecht, supra. Mere ignorance of evidence on which to establish a claim is not enough, even if the complaint here could be read as alleging that. Tinkoff v. United States, 7 Cir., 1954, 211 F.2d 890; Dawson, Fraudulent Concealment and Statutes of Limitations, 1933, 31 Mich.L.Rev. 875, 916. Even if no affirmative act of concealment is required in restraint of trade conspiracy cases, see Dawson, supra, at 880, 907-08; American To-

> bacco Co. v. People's Tobacco Co., [5 Cir., 1913, 204 F. 58,] supra; cf. 63 Harv.L.Rev. at 1221, in contrast to the usual rule where there is no fiduciary relationship, a point we do not decide, there is no allegation that plaintiff did not know in the late 1920's and early 1930's whatever the facts were as to joint action by defendants. Viewed with the benevolence proper on a motion under F.R.Civ. Proc. 12(c), the complaint does not make out, indeed it rather negatives, concealment, Suckow Borax Mines Consolidated, Inc. v. Borax Consolidated, Ltd., [9 Cir., 1950, 185 F.2d 196] supra; we do not read Crummer Co. v. DuPont, [5 Cir., 1955, 223 F. 2d 238] supra, as pointing to a contrary result."

Here there is no indication in the complaints that defendants concealed from plaintiffs or that plaintiffs actually lacked knowledge of the facts disclosing the discriminatory sales practices upon which this case rests. There is no allegation that defendants attempted to create or perpetuate an erroneous impression in the minds of the plaintiffs that the homes were being sold to them at the same price, on the same terms, and under the same condition as they would be sold to whites. However, in order to insure that individual members of the plaintiff classes are not unfairly deprived of relief because the facts of their particular cases may differ from those of the classes as a whole, they should have an opportunity to display the necessary concealment at a subsequent date should the merits of the complaints be upheld.[11]

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11. The complaints also contain scattered allegations supporting the contention that certain courses of wrongful conduct engaged in by defendants were fraudulently deceptive and concealed. While we are not called upon to pass upon the merits of the claims or upon the effect of the individual allegations of fraudulent concealment, we note that reconsideration of the applicability of the statute of limitations may be in order insofar as its application is sought to certain members of the classes with regard to some peripheral wrongs. Thus the district court may be called upon to decide whether the alleged concealment of the appraised value of the mortgaged property of plaintiffs calls for recovery and tolling of the statute of limitations. Likewise, the misrepresentation of compliance with building codes may support recovery and require that, as to certain plaintiffs, the statute be tolled.

The Statutes of Limitations Do Not Begin to Run Until Each Contract Terminates.

After careful consideration, the district court concluded that the three statutes of limitations commenced running only upon the termination of the individual contracts. The court stated that the defendants "are alleged to have been reaping the unlawful benefit through continuing enforcement of their unlawful scheme." 300 F.Supp. at p. 220. We agree with this conclusion.

Plaintiffs have alleged wrongs committed by defendants which continue during the entire lives of the individual purchase contracts. They have alleged a conspiracy among defendants, the object of which was the establishment of a continuing relationship with individual plaintiffs. That relationship, by the same token, constituted a prolonged and continuing invasion of the rights of the purchasers. As in Hazeltine Research, Inc. v. Zenith Radio Corporation, 418 F.2d 21 (7th Cir. 1969), the limitations periods commence to run from the last overt act of the conspiracy, permitting plaintiffs to recover "for damages suffered within the damage period as a result of an overt act repetitious of the unlawful pre-[limitation] period acts occurring in the damage period" (418 F.2d at p. 25). Because of the continuing nature of the overt acts alleged, the statutes of limitations do not commence to run when the contracts were executed but when they terminate. Hanover Shoe v. United Shoe Machinery Corp., 392 U.S. 481, 502, n. 15, 88 S.Ct. 2224, 20 L.Ed.2d 1231.

Defendants are incorrect when they argue that here, as in Emich Motors Corporation v. General Motors Corp., 229 F.2d 714, 59 A.L.R.2d 159 (7th Cir. 1956) and Baldwin v. Loew's Inc., 312 F.2d 387 (7th Cir. 1963), only a single act was involved. In *Emich*, this Court concluded that the announcement by General Motors that Emich's dealership was to be cancelled and the actual cancellation of the dealership were so contiguous

in time and of such a unitary character as to present but a single invasion of the rights of the plaintiff. And in *Baldwin*, acts of defendants which terminated outside the limitation period caused plaintiff to enter a lease with the third party. As those cases disclose, the touchstone of our inquiry must be the nature and extent of defendants' behavior, not the duration of plaintiff's injury. Here the defendants have entered into a series of contracts which manifest an on-going relationship between the individual participants and constituting the alleged invasion of the rights of the plaintiffs.

For the foregoing reasons, the limitations portions of the district court's orders are affirmed.[12]

12. Defendants' objection to the filing of plaintiffs' reply brief is overruled. In No. 17750-17751, defendants' motion for taxing the costs of printing the opinion below in their appendix is granted but only as to printing the parts of the opinion not relating to the statute of limitations.

SUPREME COURT, U. S.

FILE

NOV 28

MICHAEL RODAK, JR.

No. 74-475

In the Supreme Court of the United States

OCTOBER TERM, 1974.

UNIVERSAL BUILDERS, INC., et al,

Petitioners,

vs.

SIDNEY AND JULIA CLARK, et al,

Respondents.

BRIEF IN OPPOSITION

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Respondents.

BRIEF IN OPPOSITION

OPINIONS BELOW

Petitioners (defendants below) are seeking review of two interlocutory opinions of the United States Court of Appeals for the Seventh Circuit. At 501 F.2d 324, the Seventh Circuit unanimously reversed a verdict directed against respondents at the close of their case and remanded for a new trial. At 420 F.2d 1191, the Seventh Circuit unanimously affirmed certain statute of limitations rulings by the district court; this Court previously declined to review the statute of limitations decision (400 U.S. 821). Both opinions are printed in the Appendix to the petition.

QUESTIONS PRESENTED

The petition raises the following questions:

1. Does a seller of residential housing violate the Civil Rights Act of 1866 (42 U.S.C. §1982) if he charges black citizens prices which are unreasonably in excess of prices charged white citizens for comparable housing?

2. Is an officer of a corporation liable for his own violations of 42 U.S.C. §1982, as well as the corporation which he owns and operates?

3. If a violator of a black citizen's civil rights reaps a benefit from continuing enforcement of an unlawful scheme, is the statutory limitations period tolled during the continuing unlawful action?

4. May petitioners avoid liability for their violations of 42 U.S.C. §1982 on the ground that the decision below should not be applied retroactively?

STATEMENT OF THE CASE

The Seventh Circuit's opinion (501 F.2d 324, reprinted at Petition A. 1-29) contains a comprehensive summary of the evidence which was adduced during the six week trial. We shall briefly summarize respondents' case and correct misstatements made by petitioners.

Respondents are a class of over 1,000 black families who bought new residential housing on the southside of Chicago from petitioners during the period 1958-68. Respondents alleged, and proved *prima facie*, that: (1) due to rigid racial segregation, a dual housing market exists in Chicago, one for whites and one for blacks; (2) the supply of housing in the black market, as compared to the white market, is scarce relative to the demand; (3) petitioners took advantage of this market situation by

charging respondents prices unreasonably in excess of prices charged white persons for comparable housing and on terms more onerous than the terms to which whites were subject; (4) one of the petitioners and corporations which were closely related to the other petitioners by virtue of substantially common ownership and management sold new houses of comparable value to whites at lower prices than the prices which petitioners charged respondents.

Petitioners assert that they were willing to charge the same excessive prices to whites as they charged respondents. This assertion is specious since whites were not subject to the same infirmities of discrimination as respondents. Thus, whites, who were not forced to pay excessive prices for housing, did not purchase housing from petitioners on the southside of Chicago.

Respondents' evidence showed that one of the petitioners and corporations owned and managed by substantially the same persons* as the other petitioners sold homes exclusively to whites in Deerfield, Illinois, an all-white Chicago suburb. Although many of the homes purchased by respondents were of comparable value, the prices charged respondents were far in excess of the prices charged the white purchasers. The same was true of the prices of P.F.S. Development Co. (P.F.S.), which also operated in a predominately white suburb of Chicago. The president and owner of one of the petitioners was the first president and an owner of P.F.S. and set the prices of houses sold by P.F.S.

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* All of the officers, directors and shareholders of these petitioners and the related corporations were very close blood relatives. The managing officers were always the same persons.

Respondents' evidence showed that, absolutely and relative to direct costs and sales price, petitioners' gross and net profit per home exceeded by approximately 80% to 100% the gross and net profit earned in the Deerfield operation. Although there is no evidence in the record concerning the net profit of P.F.S., petitioners' gross profit per home exceeded P.F.S.' gross profit per home by about 100%.*

Richard Freeman, an economist who analyzed respondents' evidence on comparative prices and profits, testified: "I reached the conclusion that, in fact, the prices paid by plaintiffs in this case were in part, in large part, determined by their race." He concluded that the differences between the prices charged respondents and the lower prices charged whites in Deerfield were due to the race of the buyers (Petition A.23 and n.21).

In sum, petitioners' assertion that they "had treated all with equality" is false. This assertion depends on the untenable proposition that the same individuals can evade section 1982 by the simple procedure of setting up different

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* The net profit assertions in the first full sentence of page 6 of the petition are not supported by the record. The evidence in the record shows that petitioners' net profit per home far exceeded the net profit per home on sales to whites, both absolutely and relative to direct cost and sales price. Since all of these corporations were closely held, corporate net profit figures were subject to manipulation. Respondents showed that petitioners paid out large sums of money to the members of the shareholder families in order to create deductions and minimize the impact of the double taxation of corporate earnings and dividends. The Seventh Circuit recognized this problem by concentrating on the evidence of gross profits (Petition A. 21-23).

corporations with common ownership and management to deal with whites and with blacks.

The trial judge, the Honorable Joseph Sam Perry, stated that, while petitioners had exploited respondents for profit, they had not discriminated. He ruled that, even if blacks were charged higher prices than whites for comparable housing, section 1982 was not violated because these comparable white sales were not made by petitioners. He excluded all evidence of the suburban sales to whites by petitioners and their related corporations (Petition A.3. 19-23).

The Seventh Circuit, after a thorough review of the 5,460 page trial transcript and numerous documentary exhibits, reversed the trial judge's rulings on these issues. It also reversed several other rulings of the trial judge, to include rulings which were intended to frustrate appellate review (see Petition A.27-28).

REASONS WHY THE WRIT SHOULD BE DENIED

I.

The Seventh Circuit's Decision, Which Petitioners Have Misrepresented, Does Not Conflict With Jones v. Mayer, 392 U.S. 409 (1968).

Petitioners have completely misrepresented the holding of the Seventh Circuit. It did *not* hold that blacks state a cause of action if they merely allege that the prices charged them for housing were "unreasonable." Rather, it held (Petition A.14):

> "We hold accordingly that plaintiffs state a claim under section 1982 since they allege that (1) as a result of racial residential segregation dual housing markets exist and (2) defendant sellers took advantage of this situation by demanding prices and terms unreasonably in excess of prices and terms available to white persons for comparable housing. If the plaintiffs sustain the burden of proof on these elements they make out a *prima facie* case, whereupon, as recently made clear by the Supreme Court, the burden of proof shifts to the defendants 'to articulate some legitimate, nondiscriminatory reason' for the price and term differential. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)."

After its review of the voluminous record, the Seventh Circuit held that, as a *prima facie* matter, respondents proved that the prices which petitioners demanded were unreasonably in excess of the prices available to white persons for comparable property.

In *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 420 (1968), this Court stated that "In plain and unambiguous terms, §1982 grants to all citizens, without regard to race or color, 'the same right' to purchase and lease property 'as is enjoyed by white citizens.' " Also, this Court warned that the promises set forth in the Thirteenth Amendment would constitute "... 'a mere paper guarantee' if Congress were powerless to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man." 392 U.S. at 443.

Since respondents paid more than whites for comparable housing, they did not have the "same" right as whites to buy housing and their housing dollars were worth less than white citizens' dollars. This is true even if petitioners had never sold to whites and even if respondents had relied solely on evidence of sales by others to whites to prove that the prices demanded by petitioners were unreasonably in excess of prices available to white persons for comparable housing.

The Seventh Circuit's decision does not conflict with the clear language of section 1982 or with this Court's decision in *Jones* v. *Mayer*.

II.

Consideration Of Whether To Review This Case Should Await Full Development Of The Record.

The Seventh Circuit's decision on the issue of discrimination rests on two separate grounds. The Seventh Circuit held that, irrespective of whether petitioners sold to whites, they violated section 1982 since the prices which they demanded were unreasonably in excess of the prices available to whites (Petition A.4-15). Petitioners call this a "novel" construction of section 1982 (Petition 16). Also,

it held that respondents had proved more favorable sales to whites by petitioners and related corporations, evidence of which was erroneously excluded by the trial judge (Petition A.19-24).

The second ground of the Seventh Circuit's decision merely involves rulings on evidentiary questions after a review of the trial record. These evidentiary rulings are not substantial enough to warrant review by this Court.

As shown above, the first ground of the Seventh Circuit's decision is not novel, but rather is based on the clear language of section 1982 and this Court's decision in *Jones v. Mayer*. In any event, since retrial of the case is called for on the factual issues of discrimination raised by the second ground of the Seventh Circuit's opinion, the petition should be denied. On retrial, petitioners will have the opportunity to rebut the evidence with respect to both of these claims of racial discrimination.

III.

Since Individuals, As Well As Corporations, Are Liable For Their Own Civil Rights Violations, The Seventh Circuit's Decision That Respondents Should Be Permitted To Add As Defendants The Managing Officers Of Petitioners Does Not Conflict With The Decision Of Any Federal Court.

A month before the trial was scheduled to begin, and four months before it actually began,* respondents moved for leave to add as defendants petitioners' managing officers who were also shareholders and directors. Respondents claimed that petitioners were mere corporate shells through which the officers conducted their discriminatory schemes

* Postponements requested by both sides accounted for this delay.

to reap illegal profits. The trial judge denied this motion solely on the ground that adding new parties would delay the trial. The Seventh Circuit reversed that ruling (Petition A.24-25).

No substantial question is raised by the ruling that respondents should have been granted leave to amend. Contrary to petitioners' assertions, it is no more "unique" that a corporate officer is liable for his own civil rights violations, than it is unique that a servant is liable for his own torts. See *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971) (individuals liable for violations of 42 U.S.C. §1985 (3)).

There is no conflict with *Spears* v. *Transcontinental Bus System*, 226 F.2d 94 (9th Cir. 1955). In *Spears*, the court held that ownership, without more, did not render a parent corporation liable for the civil rights violations of its subsidiary corporation. That is wholly different than holding officers, who are also shareholders,* answerable for their own illegal conduct.

IV.

The Statute Of Limitations Question Is Not In Conflict With Any Decision Of This Court Or The Courts Of Other Circuits.

Respondents alleged, and proved *prima facie*, that petitioners' insistence on the installment contract form of sale was an essential part of their discriminatory selling

* Not all of the shareholders were added as defendants. Only those who actively managed the closely-held corporate defendants were added.

methods.* In a decision which this Court previously declined to review (400 U.S. 821), the Seventh Circuit held that the applicable five-year statute of limitations period did not commence to run until the contracts terminated because the contracts involved continuing enforcement of an unlawful scheme (420 F.2d 1191, 1200, reprinted at Petition A.44-45).

This decision, which merely affects the size of the class in this case, is not inconsistent with the decision in *Zenith Radio Corporation* v. *Hazeltine Research, Inc.*, 401 U.S. 321 (1971), or any of the circuit court opinions cited by petitioners. In *Zenith*, this Court held that the limitations period for a private anti-trust action is tolled by a government action and does not bar recovery of damages for pre-limitations conduct which were speculative at the time the conduct occurred. Clearly, the *Zenith* decision does not conflict with the decision below.

V.

The Question Of Retroactive Application Of The Lower Courts' Construction of 42 U.S.C. § 1982, Not Heretofore Raised By Petitioners, Does Not Warrant Review.

Although the interpretation of section 1982 which petitioners call "novel" was first pronounced about three years

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* Mortgage money was unavailable due to the exorbitant prices demanded by petitioners, thereby requiring them to employ the contract sales method. The contracts did not specify the contract term. Respondents' amortization calculations showed that many had terms as long as from 35 to over 46 years. The contracts contained onerous provisions to which a mortgagor is not subject (Petition 17-19 nn.12-14).

prior to trial,* petitioners have waited until now to raise the issue of retroactive application of that interpretation. Petitioners' untimely attempt to raise this question should be rejected.

Furthermore, the question is insubstantial. The Seventh Circuit followed the decision in *Jones* v. *Mayer* in which this Court put new life into section 1982 after it had lain dormant for a century. In *Waters* v. *Wisconsin Steel Works of Internat'l. Harvester Co.*, 427 F.2d 476, 484 (7th Cir. 1970), *cert. denied*, 400 U.S. 911 (1970), the Seventh Circuit rejected an argument that *Jones* v. *Mayer* should not be applied retroactively:

> "Finally, defendants maintain that the Jones case should not be given retroactive application. This argument is sufficiently answered by the fact that the Supreme Court has already applied the Jones case retroactively in Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969)."

The same answer applies here.

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* Judge Hubert L. Will originally presided over this case and denied petitioners' motion to dismiss. *Contract Buyers League* v. *F & F Investment*, 300 F.Supp. 210, 214-16 (N.D. Ill. 1969), previously consolidated with the instant case. The trial judge implicitly overruled Judge Will whose opinion on the scope of section 1982 and the meaning of *Jones* v. *Mayer* was, in effect, affirmed by the Seventh Circuit (Petition A. 11 and n.7).

CONCLUSION

The petition should be denied.

Respectively submitted,

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November 22, 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NOV 29 1974

No. 74-475

UNIVERSAL BUILDERS, INC., ROSEWOOD CORPORATION, HAMILTON CORPORATION, LAWSON CORPORATION, INDEPENDENCE HOMES, INC., JARVIS HOMES, INC., CHATHAM TOWN HOMES, INC., and LARCHMONT HOME DEVELOPMENT CO.,

Petitioners,

vs.

SIDNEY and JULIA CLARK, REV. ROBERT ANDERSON, JR., DEE BELLANFANT, EDWARD and FREDDIE MAE BROWN, CLARANCE and MARY ANN CARR, ARTHUR and THELMA GREEN, CHARLES and CLEORIA HARDY, BESSIE HENDERSON, JOHN and WILLIE M. JACKSON, GREAD and NAOMI D. McKINNIS, JULIA W. MONTGOMERY, HARRY C. and MATTIE B. PELTON, JAMES and WILLIE PHELPS, ERNEST and SHIRLEY T. POWELL, JR., MRS. JOHNNIE RAMSEY, JOSEPH L. and BEVERLY THOMPSON, and WILLIAM and RUBY YOUNGBLOOD, on their own behalf and on behalf of all others similarly situated,

Respondents.

PETITIONERS' REPLY BRIEF.

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Respondents.

PETITIONERS' REPLY BRIEF.

THE BRIEF IN OPPOSITION TACITLY ADMITS THAT THIS CASE PRESENTS A SIGNIFICANT CONSTITUTIONAL QUESTION OF SUBSTANTIAL PUBLIC IMPORTANCE.

The petition filed herein discloses that the Seventh Circuit's decision is not only contrary to the plain wording of Section 1982, but also if given the construction placed upon it by the Seventh Circuit, the statute is unconstitutional. Significantly,

respondents' brief *ignores* this constitutional challenge. Instead, it urges this Court to refrain from review because a new trial was ordered. But a new trial will neither resolve the precedent value of the decision below, whether petitioners win or lose, nor will it stem the scores of cases that the decision has and will spawn, a point also noted in the petition and ignored in the brief in opposition.

Petitioners respectfully submit that expense and time, not only to petitioners, but to the countless other litigants who are and will be involved in litigation spawned by this decision, to say nothing of the burden placed upon the federal courts, should be avoided; that the ends of justice will be best served by review now.

In their effort to avoid review, respondents have misstated the issues. The issue is not whether 42 U. S. C. § 1982 is violated when a seller charges blacks prices which are higher than a third party or "related company"* charges whites for comparable property. The houses sold by the Deerfield joint venture were available to all who wished to buy and PFS Development Co. sold its houses to both whites and blacks. The issue is whether a seller can violate Section 1982 if he offers to all the property he has to sell on the same terms and conditions and sells to all who wish to buy on the same terms and conditions.

The issue is not whether a corporate officer is liable for his own violation of Section 1982. The issue is whether a corporation's alleged violation of civil rights, without more, automatically imposes liability on its officers, directors and shareholders.

The issue is not whether there has been a tolling of the statute of limitations or whether there has been an alleged

* Respondents' counsel admitted during the trial, with reference to the homes sold by the "related companies," "We don't claim the homes are identical. The area is not comparable . . . We are not comparing one house to another" and "The homes are not comparable; the area is fifty miles away."

continuing enforcement of an unlawful scheme. The issue is when did the cause of action accrue.

The issue of retroactive application was not settled by *Waters* v. *Wisconsin Steel Works of International Harvester Co.*, 427 F.2d 476 (7th Cir. 1970), *cert. den* 400 U.S. 911 (1970), as respondents claim. *Waters* dealt with retroactive application of *Jones* v. *Mayer Co.*, 392 U.S. 409 (1968), but the decision in the instant case is in clear conflict with *Jones*, where it was held that Section 1982 means what it says and should be so applied. If the section does not mean what it says and does mean what the instant decision holds, this unusual, unforeseen and unforeseeable rewriting of the statute should not be applied retroactively.

CONCLUSION.

The vital issues here are issues of law* which, in the interests of justice, should be resolved now.

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* Consequently, petitioners have not discussed the omissions of significant facts in the opinion and the respondents' numerous misstatements of the record.